

# A CONSENT-BASED APPROACH TO CLASS ACTION SETTLEMENT: IMPROVING *AMCHEM PRODUCTS, INC. v. WINDSOR*

MARK C. WEBER\*

*This Article contends that class actions with preclusive effect should not be settled unless the court gives all class members the option to reject the settlement and exclude themselves from the class at the time of the offer. The only exception should be those actions in which the problems of class members holding out their agreement would be insurmountable, cases involving a limited fund or the equivalent.*

*The Article criticizes the recent decision Amchem Products, Inc. v. Windsor, in which the Supreme Court overturned the settlement of a mass tort class action on the ground that the case failed to meet the standards in the federal class action rule concerning predominance of common issues and adequacy of representation. The Court's heightened attention to predominance and representative adequacy will bar desirable class action litigation and settlements, but does not afford what would actually be of use to the class members: the ability to make their own personal decisions about whether a proposed class action settlement is acceptable to them.*

*This choice to accept or refuse settlement is the one most closely comparable to that which non-class action litigants exercise. Moreover, no one else can make this choice for the individual class member: a decision made by a class representative or a court will neither uphold the class member's personal freedom of decision nor accommodate the individual's preferences for risk.*

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\* Professor of Law, DePaul University. B.A. 1975, Columbia; J.D. 1978, Yale. I would like to thank Susan Bandes, Jack Beermann, Michael Jacobs, Jane Rutherford, Jeffrey Shaman, Stephen Siegel, Carl Tobias, and Ralph Whitten for their comments on earlier versions of this work. Thanks also to Morris Gaan and Jo Ann Gryder for their research assistance.

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## I. INTRODUCTION

Like most other cases, most class actions settle.<sup>1</sup> Unlike most settlements, class action settlements raise serious questions about the true willingness of all the parties to compromise their legal claims. In *Amchem Products, Inc. v. Windsor*,<sup>2</sup> the Supreme Court overturned the settlement of a mass tort class action on the ground that the case failed to meet the standards in the class action rule concerning predominance of common issues and adequacy of representation.<sup>3</sup> The class had been certified for purposes of settlement only, and consisted of

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<sup>1</sup> A recent, comprehensive study of class action litigation in four federal districts indicated that settlement rates for each district for non-prisoner class actions were within 16% above or below the settlement rates of the districts for non-prisoner cases that were not class actions; the rate of trial in class actions was close to that of non-class actions—in the single digits in all districts for both class actions and other civil cases. See Thomas E. Willging et al., *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 92 (1996).

<sup>2</sup> 117 S. Ct. 2231, 2235–36 (1997).

<sup>3</sup> See FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all only if . . . (4) the representative parties will fairly and adequately protect the interests of the class."); FED. R. CIV. P. 23(b) ("An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . . (3) the court finds that the questions of fact or law common to the members of the class predominate over any questions affecting only individual members . . .").

individuals who had been exposed to the defendants' asbestos but who had not filed suit.<sup>4</sup> All manners of injured, latently injured, and non-injured persons were included.<sup>5</sup> The settlement afforded a fixed schedule of damages based on various manifest, direct injuries, subject to limited individualized review and a practical prohibition on the ability to use ordinary tort adjudication for the claims.<sup>6</sup> Written notice, with the right to opt out of the settlement, was ultimately afforded to 6.8 million people<sup>7</sup> in a class that might have included twenty to thirty million<sup>8</sup> members; the notice was supplemented by extensive publicity efforts.<sup>9</sup>

Although legitimate controversy exists on the issues that led to the Court's rejection of the *Amchem* settlement—predominance of common issues and representative adequacy—the showing the parties made on these subjects was no weaker than that in many class actions that have reached conclusions widely regarded as successful.<sup>10</sup> The Supreme Court's new, heightened attention to predominance and representative adequacy is likely to bar useful class action litigation and settlements.<sup>11</sup>

At the same time, the decision fails to recognize an alternative approach: requiring individual class member consent in class action settlements. What *Amchem* did not afford is what the class members actually need: the ability to make their own personal decisions about whether a proposed class action settlement is acceptable to them. It is this choice, made with adequate information at a meaningful time, that is most closely comparable to the choice that non-class action litigants make.<sup>12</sup> Moreover, it is this choice that no one else can make for

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<sup>4</sup> See *Amchem*, 117 S. Ct. at 2239–40 n.5.

<sup>5</sup> See *id.* at 2240.

<sup>6</sup> See *id.* at 2240–41.

<sup>7</sup> See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 312 (E.D. Pa. 1994) (citing estimates from Final Notice Report), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997).

<sup>8</sup> See *id.* at 325. The Court found that the exact size of the class was unknown. See *id.* at 261. The Third Circuit declared that the class was between 250,000 and 2,000,000, but the basis for this count is not clear from the opinion. See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 617 (3d Cir. 1996).

<sup>9</sup> See *Georgine*, 157 F.R.D. at 312.

<sup>10</sup> See *infra* notes 163–86 and accompanying text.

<sup>11</sup> A telling example of how the Court's approach may bar desirable agreements is the silicone gel breast implant litigation, which nearly settled in 1996. See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV92-P-10000-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994) (approving settlement terms). The breast implant litigation had many of the same weaknesses of predominance of common issues and representative adequacy that *Amchem* had, but the breast implant settlement featured meaningful notice and afforded opt-out rights to all those whose cause of action was to have been foreclosed, *id.* at \*2–4 (notice), \*11 (opt out and final approval), and thus was little different from the agreed resolution of any individual case at an early stage of factual and legal development. See *infra* notes 163–80 and accompanying text.

<sup>12</sup> See *infra* notes 202–04, 232 and accompanying text.

the individual class member, for a decision made by a class representative or a court will neither uphold the class member's personal freedom of decision nor accommodate the individual's preferences for risk.<sup>13</sup> If a class member chooses not to settle, that individual ought to be afforded the further choice to sue individually or to start an independent class action comprising all persons dissatisfied with the settlement offer.

Individual choice to settle or to opt out at the time of settlement does not completely substitute for the other safeguards found in Rule 23, including the predominance and representative adequacy requirements. But while it is far more important than either of those requirements, it is nowhere explicitly required by Rule 23. The only individual choice required by Rule 23 is the ability to opt out at the time of certification, and even that right is not afforded in all class actions.<sup>14</sup>

In this Article, I contend that class actions with preclusive effects should not be settled unless the court gives all class members the option to reject the settlement and exclude themselves from the class at the time of the offer. The only exception should be those actions in which the problems of class members holding out their agreement would be insurmountable: cases involving a limited fund or the equivalent.<sup>15</sup> In cases in which a meaningful choice to accept or reject the settlement is afforded, predominance and representative adequacy standards may be relaxed sufficiently so that a wider range of cases can be adjudicated economically by the class action device.<sup>16</sup>

In line with this view of class action settlement, the Supreme Court was correct to vacate the *Amchem* settlement, but not because of a lack of

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<sup>13</sup> See *infra* notes 194–222 and accompanying text.

<sup>14</sup> The right to opt out of the class at the time of class certification is afforded only in class actions brought under subdivision (b)(3) of the federal class action rule. See FED. R. CIV. P. 23(b), 23(c)(3).

<sup>15</sup> These cases are designated subdivision (b)(1) class actions. FED. R. CIV. P. 23(b)(1)(B).

<sup>16</sup> The approach advocated here applies not only to class actions in federal court, but also to class actions in state court. Personal autonomy and individual preferences are considerations in state court just as they are in federal court, and dictate a right to individual consent before settlement. Because most states' class action rules or statutes are identical to Federal Rule 23, this Article uses the federal categories and terminology. States whose laws are different should apply the same principles under their own statutes and rules; the typical non-replica laws do not differ much from the Federal Rule. For discussions of class actions in state court, see ALEXANDER B. AIKMAN, *MANAGING MASS TORT CASES: A RESOURCE BOOK FOR STATE TRIAL COURT JUDGES*, ch. 12 (1995); ILLINOIS JUDICIAL CONFERENCE STUDY COMMITTEE ON COMPLEX LITIGATION, *ILLINOIS MANUAL FOR COMPLEX LITIGATION*, ch. 9 (3d ed. 1997); Mark C. Weber, *Managing Complex Litigation in the Illinois Courts*, 27 LOYOLA U. CHI. L.J. 959 (1996). Far from wishing to denigrate the role of state courts in resolving complex cases such as class actions, I have proposed that state courts should be the forum of choice in class actions and other consolidated proceedings involving mass disasters and dispersed product injuries. See Mark C. Weber, *Complex Litigation and the State Courts: Constitutional and Practical Advantages of the State Forum over the Federal Forum in Mass Tort Cases*, 21 HASTINGS CONST. L.Q. 215, 255 (1994) [hereinafter Weber, *State Courts*].

predominance of the common issues or because of inadequate representation. Instead, the failing was that the class included persons who had no reason to know of or to be concerned about their potential injuries. The reason the failing mattered was that those class members were unable to receive meaningful notice, and were therefore unable to make sensible individual decisions whether to accept or reject the settlement.

The last decade has seen a mushrooming of class action scholarship as courts have explored the use of class actions in asbestos and other mass tort cases. Though commentators have either extolled<sup>17</sup> or protested<sup>18</sup> the use of class actions in these cases and have either praised<sup>19</sup> or decried<sup>20</sup> existing practices

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<sup>17</sup> See, e.g., Linda Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 TEX. L. REV. 1039, 1043-45 (1986) (proposing federal mass tort procedure act as means for dealing with nationwide mass-tort litigation crisis); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 568 (1987) (calling for aggregative remedies in mass tort litigation to maintain the distributional fairness implicit in the notion of individual fairness); Georgene M. Vairo, *Georgine, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 83 (1997) (proposing aggregated solutions as best method for resolving mass tort claims). But see Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79, 87, 104-05 (1994) (adding reservations).

<sup>18</sup> See, e.g., John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1350 (1995) (arguing that mass tort class action has increasingly become a shield for defendants); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 69 (challenging group treatment of cases at disposition phase); Roger H. Transgrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 816-31 (1985) (discussing disadvantages of class action treatment of mass torts). Commentators have also suggested either incremental or radical movement towards administrative programs to supplant class actions as a method of compensating victims of mass torts. See, e.g., Richard A. Nagareda, *Turning from Tort to Administration*, 94 MICH. L. REV. 899, *passim* (1996); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 564-65 (1994).

<sup>19</sup> See, e.g., Eric D. Green, *Advancing Individual Rights Through Group Justice*, 30 U.C. DAVIS L. REV. 791, 802-03 (1997) (defending class action settlement in large-scale asbestos cases); Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 609-10, 613-14 (1997) (challenging some criticisms of class action settlement practice); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615 (1997) (responding to criticism of proposed amendment to civil rules that would explicitly permit use of settlement classes and codify other current class action practices) [hereinafter Mullenix, *Constitutionality*]; David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210, 252-57 (1996) (expounding virtues of collective settlements in mass tort cases); Vairo, *supra* note 17, at 165-66 (advocating specific judicial procedures to determine that settlement funds are sufficient and distributed fairly); see also Linda S. Mullenix, *Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation*, 32 WM. & MARY L. REV. 475, 550-56 (1991) (describing settlement process in asbestos class actions).

<sup>20</sup> See, e.g., Paul D. Carrington & Derek P. Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Illegitimacy of Mass-Tort Settlements Negotiated Under Federal*

with respect to class action settlement, none has developed the case for requiring individual consent to settlement in all class actions.<sup>21</sup> Professor Rutherglen has come closest to doing so by proposing delay in class certification until the settlement phase of a class action, at which point notice would be issued to class members, and opt-out rights afforded in all actions not seeking a classwide injunction.<sup>22</sup> He views the matter as one of timing—the right to opt out should come at a meaningful time, hence certification should wait until enough information emerges that the litigant can make a sensible decision about what terms to accept.<sup>23</sup> By contrast, the overriding concern of this Article is not timing, but choice. Class action settlement should be allowed to take place at any stage of the proceedings, just as an individual suit may be settled before, during, or after trial. It should be the class member's decision whether to withhold acceptance of the agreement pending the development of more information, or to take the money now. Certification without settlement should also be allowed to take place early. If the class representative chooses to press for quick certification in order to

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*Rule 23*, 39 ARIZ. L. REV. 461, 462–74 (1997) (criticizing settlement class actions); Roger C. Cramton, *Individualized Justice, Mass Torts, and "Settlement Class Actions": An Introduction*, 80 CORNELL L. REV. 811, 825 (1995) ("Recent experience with class action settlements in mass tort cases provides notice of danger signals that trial and appellate courts should be alert to in reviewing the adequacy and reasonableness."); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1086–1126 (1995) (criticizing process and substance of *Amchem* settlement); John Leubsdorf, *Class Actions at the Cloverleaf*, 39 ARIZ. L. REV. 453, 457–60 (1997) (criticizing mass tort settlement class actions); John Leubsdorf, *Co-opting the Class Action*, 80 CORNELL L. REV. 1222, 1225–26 (1995) (suggesting that parties opposing the class can manipulate class counsel).

<sup>21</sup> Some commentators have edged towards such a view. See Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 811 n.17 (1997) (observing that "settlement decisions ultimately reflect an assessment of risk and are subject to individual variations in risk-seeking or risk-aversion—decisions which should presumptively be left to the affected individuals," but focusing on other questions and not having occasion to work out the implications of this insight for the existing law of class action settlement); Patrick Wooley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 610 (1997) (arguing that a class member should have the right to reject a settlement, but only as part of a broader argument that class members should be afforded the right to intervene in class action proceedings if they believe the representative is inadequately representing their interest); see also Richard L. Marcus, *They Can't Do That, Can They? Tort Reform via Rule 23*, 80 CORNELL L. REV. 858, 888–96 (1995) (discussing the importance of consent, which in turn depends on notice and choice, in permitting tort litigation to accomplish the parties' goals). Professor Marcus further contends that plaintiffs' consent has been dubious in many instances. See *id.* at 881–82. Nevertheless, he does not appear to advocate the choice of whether to accept settlement in all instances, but simply advocates adequate notice and the right to opt out of the class at the time of certification, among other incremental reforms. See *id.*

<sup>22</sup> See George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 270, 278, 288 (1996).

<sup>23</sup> See *id.* at 280–81.

gain a strategic advantage over the defendant,<sup>24</sup> or to obtain a prompt determination whether shifting of litigation costs to the class will be possible,<sup>25</sup> the class representative should be allowed to do so. But if the case then settles, individual notice of the settlement should be provided to all class members, and the members should have the right to accept the deal or opt out and possibly file their own actions.

Part II of this Article discusses the law of class action settlement as it existed before the *Amchem* decision. Part III describes *Amchem*'s approach to class action settlement and details its effects on class action settlement practice. Part IV criticizes the approach taken by the case, citing examples of how it will frustrate useful settlement agreements. Part V sketches an alternative view of the law of class settlements, one that relies on individual consent. It takes up the advantages of requiring consent, the components of meaningful consent in contrast to implied consent, and the practical effects of a consent standard. Part VI discusses the flaws of alternative approaches to regulating class action settlement. The last section of the Article, Part VII, considers the limits of the consent-based model and the problem of limited fund class actions.

## II. THE LAW OF CLASS ACTION SETTLEMENT BEFORE *AMCHEM*

The class action device permits numbers of individuals to approach a court as a single, temporary unit created for the litigation itself.<sup>26</sup> A part of traditional equity practice, by the late 1930s the class action had proven useful both for resolving disputes among the members of organizations and for sharing the costs of litigating similar small, individual claims against a single wrongdoer.<sup>27</sup> In the

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<sup>24</sup> Many courts have commented on the potential strategic advantages of class proceedings in some kinds of cases, occasionally characterizing the advantages as unfair. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1295-1302 (7th Cir. 1995); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1830 (1995) ("If plaintiffs' counsel can obtain class action certification and thereby increase the amount in dispute, the defendant will be sufficiently averse to threats to its balance sheet and stock price that it will favor settlement.").

<sup>25</sup> As the Court stressed in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), the availability of cost-shifting is a reason to bring or join in a class action. "A significant benefit to claimants who choose to litigate their individual claims in a class-action context is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all the members of the class who benefit from any recovery." *Id.* at 338 n.9.

<sup>26</sup> *See* STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION 267-91 (1987) (analyzing the history of group litigation and the class action device and tracing the roots of class action litigation to the high middle ages).

<sup>27</sup> *See* Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Action Suit*, 8 U. CHI. L. REV. 684, 684-88 (1941) (discussing litigation as a device to assist in curbing securities fraud and other misconduct in which individual damage was likely to be modest). For more recent works discussing the history of class action litigation, see YEAZELL,

1950s and 1960s, civil rights advocates used the class action to redress discrimination<sup>28</sup> and to obtain government benefits that were wrongfully withheld.<sup>29</sup> More recently, class actions have been brought in mass tort cases, embracing the large number of claims that might be brought by the victims of a single disaster, or the many, dispersed claims that could be brought against the manufacturer of a defective medicine or other broadly marketed product.<sup>30</sup> These contemporary functions of class action suits affect the legal considerations relevant to settlement of class actions. The considerations emerge from both the current law of class actions and the specific requirements of class action settlement.

### A. *The Law of Class Actions*

The law of class actions includes both the explicit terms of the federal civil rule that governs the topic, and an underlying legal controversy over the nature of class action proceedings.

#### 1. *Federal Rule Requirements*

Under the present federal rule governing class actions, all such proceedings must meet basic standards of numerosity (a sufficiently large number of persons in the class to justify combined treatment); common question (that the class members share a common question of law or fact in the case); typicality (that the claim of the class representative is typical of the claims of the members); and representative adequacy (that the class representative will fairly and adequately represent the class).<sup>31</sup>

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*supra* note 26; John G. Harkins, Jr., *Federal Rule 23—The Early Years*, 39 ARIZ. L. REV. 705 (1997) (analyzing experience under 1938 version of Federal Rule 23 and its influence on the 1966 amendments); Thomas D. Rowe, Jr., *A Distant Mirror: The Bill of Peace in Early American Mass Torts and Its Implications for Modern Class Actions*, 39 ARIZ. L. REV. 711 (1997) (comparing defendants' use of class action to historical use of the equitable bill of peace as means of protection against multiplicity of litigation); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 395–400 (1988) (discussing the pre-1966 “spurious” class action).

<sup>28</sup> See, e.g., Note, *Class Actions: A Study of Group Interest Litigation*, 1 RACE REL. L. REP. 991 (1956); Comment, *The Class Action Device in Antisegregation Cases*, 20 U. CHI. L. REV. 577 (1953). For more recent commentary on the topic, see Jack Greenberg, *Civil Rights Class Actions: Procedural Means of Obtaining Substance*, 39 ARIZ. L. REV. 575 (1997); Weber, *supra* note 27, at 350–53.

<sup>29</sup> See FRANCIS FOX PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 307 (1971).

<sup>30</sup> For an early discussion of this trend, see Spencer Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1983).

<sup>31</sup> FED. R. CIV. P. 23(a).



In addition, a class action must meet one of three other requirements, which will determine how it is classified for the application of still other requirements and procedures.<sup>32</sup> Cases under subdivisions (b)(1) and (b)(2) of Rule 23 are often termed “mandatory class actions” because they afford class members no right to opt out. Subdivision (b)(1) is for cases in which separate actions would create a risk of inconsistent or varying adjudications that would result in inconsistent standards for the entity opposing the class, and for those cases in which individual dispositions would effectively dispose of interests of other members not parties to the case or otherwise unable to protect their own interests. Subdivision (b)(2) covers cases in which the entity opposing the class has acted or failed to act on grounds that apply generally to the class, making injunctive or declaratory relief appropriate for the class as a whole. Subdivision (b)(3) cases are those in which the questions of law or fact common to the class predominate over those affecting individual members, and the class action is superior to other methods of handling the case.<sup>33</sup>

## 2. Representation or Joinder?

In legal history as well as under the present rules, two contrasting views of class action litigation appear: first, that the action is a single case brought by a group that is represented by the named party and can be treated as a unit because of its innate coherence; and second, that the action is an amalgamation of many joined actions of individuals.<sup>34</sup> Representative litigation on behalf of (or against) unified communal groups has been a fixture of the Anglo-American legal landscape since the high Medieval era.<sup>35</sup> Early English cases and many later American ones embody ideas of the coherence of the group approaching the court and the representative nature of the action.<sup>36</sup> Nevertheless, over the years, concerns about individual justice have led to an increasing emphasis on individual

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<sup>32</sup> FED. R. CIV. P. 23(b).

<sup>33</sup> For subdivision (b)(3) cases, the findings relevant to predominance and superiority include the interest of the members of the class in individual control of their own actions or defenses; the extent and nature of litigation already on file; the desirability of concentrating the litigation in one forum; and potential difficulties for managing the class action. *See* FED. R. CIV. P. 23 advisory committee’s note (1966) (clarifying roles of subdivision (b) classifications).

<sup>34</sup> *See* Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459 (describing conflicting perspectives). For a more recent endorsement of the representation view and nearly all that it entails, *see* David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 917 (1998) (favoring the “class entity” approach). As detailed throughout this Article, I believe that such class action atavism is not justified; instead, individual claimants’ interests deserve protection and can be afforded protection without undue social costs.

<sup>35</sup> *See* YEAZELL, *supra* note 26, at 38–39.

<sup>36</sup> *See id.* at 220–21. As Yeazell indicates, this description may be exaggerated with respect to late nineteenth and early twentieth century American cases. *See id.* at 222–24.

rights, particularly individual rights *vis-a-vis* government decision makers.<sup>37</sup> At the same time these concerns were surfacing, lawyers began to use class actions for less cohesive groups. The upshot has been the dominance, at present, of a joinder view of class actions, rather than a unified entity view. Each member of the cobbled-together group is entitled to procedural justice.

In recent years, the Supreme Court has contributed to this emphasis on individual rights and joinder by paying special attention to the role of individual class members and their entitlements to due process in class action litigation. In 1985, *Phillips Petroleum Co. v. Shutts*<sup>38</sup> established that absent plaintiff class members have due process rights with regard to the territorial jurisdiction of the court hearing their case.<sup>39</sup> *Phillips* held that although the class member need not have minimum contacts with the forum, the forum court has to afford the member notice and the right to opt out of any (b)(3)-type case predominantly for money relief.<sup>40</sup> The Court went so far as to consistently refer to the class members as "plaintiffs," as if to emphasize their individual suits.<sup>41</sup> This emphasis on the individual case within the class action dovetailed with the Court's 1973 ruling<sup>42</sup> that each class member's damages must satisfy the jurisdictional amount in a class action under federal diversity jurisdiction, and that the amounts may not be added together<sup>43</sup> to meet the limit.<sup>44</sup>

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<sup>37</sup> See Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 689 (1997) ("It would have made as little sense to medieval lawyers to ask about the litigative standing of communities as it would to ask a modern lawyer why individuals can litigate.").

<sup>38</sup> 472 U.S. 797 (1985).

<sup>39</sup> See *id.* at 806.

<sup>40</sup> See *id.* at 811-12.

<sup>41</sup> See *id. passim*.

<sup>42</sup> See *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973).

<sup>43</sup> See *Snyder v. Harris*, 394 U.S. 332 (1969) (refusing to accumulate claims when no named plaintiffs met jurisdictional amount).

<sup>44</sup> See *Zahn*, 414 U.S. at 308-12 (Brennan, J., dissenting) (noting the tension between the refusal to extend jurisdiction over the class members who fail to meet the jurisdictional amount and the traditional extension of jurisdiction over class members who are not diverse); see also *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 366-67 (1921) (extending diversity jurisdiction over non-diverse class members), noted in *Zahn*, 414 U.S. at 309 (Brennan, J., dissenting). One possible way to reconcile *Zahn* and *Ben-Hur* is to allow diversity class actions in (b)(1) class actions, the "true" class actions that *Ben-Hur* foreshadowed, but to reject diversity classes in (b)(3) situations such as mass torts. *Zahn* relied on the character of (b)(3) actions as "congeries of separate suits." *Id.* at 296 (quoting *Steele v. Guaranty Trust Co.*, 164 F.2d 387, 388 (2d Cir. 1947)). Because (b)(3) mass tort cases are based on state law and state courts have significant institutional advantages in developing and applying that law, there may be little basis to quarrel with a result that keeps them out of federal court. Nevertheless, when the Supreme Court finally resolves the issue, it may find some means to distinguish jurisdictional amount from citizenship, or it might also view the 1990 Supplemental Jurisdiction statute, 28 U.S.C. § 1367 (1994), as a congressional authorization of diversity class actions,

Irrespective of whether the emphasis is placed on the combined unit or the individual in a class action, there should be no turning back the clock on protecting individual class members' procedural rights. A cause of action that could be filed individually in court is a valuable property interest.<sup>45</sup> It should be able to be extinguished by *res judicata* only when the court provides its owner with adequate notice and the right to be heard.<sup>46</sup>

### B. Class Action Settlements

The current law of class action settlement coexists uneasily with the dominance of the joinder view of class actions and the recognition of due process rights of individual class members. As a descriptive matter, the law of settlement approval and review has both procedural and substantive components, and each

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perhaps even when the class members have claims below the jurisdictional minimum (thus overruling *Zahn*). See Weber, *State Courts*, *supra* note 16, at 224–57. Section 1367 provides generally for supplemental jurisdiction over the state law claims of additional parties when the state claims are so related to claims in the action within the court's original jurisdiction that they are part of the same Article III case and controversy, although the court may decline jurisdiction on a number of discretionary grounds. See 28 U.S.C. § 1367(a), (c). Although section 1367 excludes some means by which additional parties are brought into cases whose jurisdiction is based on diversity, class actions are not on the forbidden list. See *In re Abbott Lab.*, 51 F.3d 524, 530 (5th Cir. 1995); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997) (adopting same view). But see *McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344, 348 (S.D.N.Y. 1996) (disagreeing with *Abbott's* interpretation of § 1367). Nevertheless, the potential ability to extend supplemental jurisdiction over the claims of plaintiff class members does not undermine the predominance of the view that the class members all possess their own individual cases and merit protection of their rights. Significant commentary exists on section 1367 and the amount in controversy in diversity actions. See, e.g., Thomas C. Arthur & Richard D. Freer, *Grasping at Burnt Straws: The Disaster of the Supplemental Jurisdiction Statute*, 40 EMORY L.J. 963 (1991) (responding to Rowe, *infra*); Thomas D. Rowe, Jr. et al., *Compounding or Creating Confusion About Supplemental Jurisdiction? A Reply to Professor Freer*, 40 EMORY L.J. 943 (1991) (responding to criticisms of the 1990 Supplemental Jurisdiction statute); Joan Steinman, *Section 1367—Another Party Heard From*, 41 EMORY L.J. 85 (1992) (commenting on Rowe, *supra* and Arthur, *supra*); Joel E. Tasca, Comment, *Judicial Interpretation of the Effect of the Supplemental Jurisdiction Statute on the Complete Amount in Controversy Rule: A Case for Plain Meaning Statutory Construction*, 46 EMORY L.J. 435 (1997) (analyzing effect of 28 U.S.C. § 1367 on *Zahn*).

<sup>45</sup> See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (holding that due process protects interest of beneficiaries of common trust fund accounts in periodic action to settle claims); *Hansberry v. Lee*, 311 U.S. 32, 42–43 (applying due process protection to interest of absent class members); see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433–37 (1982) (finding due process protection for employment discrimination claim filed with state administrative agency); Weber, *supra* note 27, at 374–79 (making this argument at much greater length). In the interests of full disclosure, it should be noted that I was one of the attorneys for the plaintiff in *Logan*.

<sup>46</sup> See *Shutts*, 472 U.S. at 807 (citing *Mullane*). This argument is made at much greater length in a previous work of mine. See Weber, *supra* note 27, at 380–94.

of these has various subcomponents.<sup>47</sup>

The procedural aspect of class action settlement comprises two steps. First, counsel make a proposed deal and submit it to the court for a preliminary fairness evaluation. The court may draw on the record of the discovery already completed, and it may rely on presentations from the attorneys or parties involved in the litigation up to the point of settlement.<sup>48</sup> Some courts hear testimony from court-appointed experts or from special masters at this stage of proceedings.<sup>49</sup>

The second procedural step occurs after tentative court approval of the proposal. The court directs that class members be provided notice of the settlement terms and the date and time of a formal fairness hearing.<sup>50</sup> Under Rule 23(e), class members are entitled to notice of a proposed dismissal or compromise of a class action. Unlike the notice of class action status and the right to opt out that Rule 23(c)(2) requires for Rule 23(b)(3) class actions, however, the notice need not be an individual mailing directed to each class member. Less effective methods, such as publication, will suffice.<sup>51</sup>

Ordinarily, the notice will solicit written statements of objection from class members, and the hearing will give class members and potential intervenors the opportunity to present their objections in person as well.<sup>52</sup> The court may approve

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<sup>47</sup> The tension between evaluation of process of mass tort settlement and evaluation of result is discussed in Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1207-11 (1995).

<sup>48</sup> See MANUAL FOR COMPLEX LITIGATION § 30.41 (3d ed. 1995).

<sup>49</sup> See *id.*

<sup>50</sup> See *id.*

<sup>51</sup> See, e.g., *Gottlieb v. Wiles*, 11 F.3d 1004, 1013 (10th Cir. 1993) (upholding publication notice and stating "[w]hile Rule 23(c)(2) requires individual notice when the names of the individuals can be easily ascertained, . . . there is no such rigid requirement under Rule 23(e).") (citation omitted); *Eirhart v. Libbey-Owens-Ford Co.*, 921 F.2d 278 (7th Cir. 1990) (table; text found at No. 89-3137, 1990 WL 223029, at \*2 (7th Cir. Dec. 21, 1990)) (approving notice program that relied primarily on publication); *Franks v. Kroger Co.*, 649 F.2d 1216, 1222-23 (6th Cir. 1981) (stating that district court has "virtually complete discretion" about the kind of notice of settlement afforded the class), *supplemented on reh'g*, 670 F.2d 71 (6th Cir. 1982); cf. *Wilson v. Southwest Airlines, Inc.*, 880 F.2d 807, 813 (5th Cir. 1989) (refusing to invalidate consent decree because of limited response from claimants to program of notification of availability of relief primarily consisting of publication).

<sup>52</sup> Interestingly, Rule 23 itself does not require a hearing, though some authorities contend that the practice "should be considered obligatory." See Jack B. Weinstein & Karin S. Schwartz, *Notes from the Cave: Some Problems of Judges in Dealing with Class Action Settlements*, 163 F.R.D. 369, 375 (1995); see also David Crump, *What Really Happens During Class Certification? A Primer for the First-Time Defense Attorney*, 10 REV. LITIG. 1, 21 (1990) (noting that courts will typically hold the hearing). Because the procedure does not guarantee any particular claimant the right to be heard on that individual's cause of action, the hearing in itself would not appear to satisfy any due process requirements that might apply to the situation. Nevertheless, the court would cut itself off from important sources of information about the justice of the settlement were it not to hold a hearing, and class members might be more prone

the settlement despite the objections, however.<sup>53</sup> Even objections from named plaintiffs are not fatal to the settlement proposal.<sup>54</sup>

The *Shutts* right to opt out of class litigation (at least for out-of-state class members in state court class actions for monetary relief) is not the right to opt out of a proposed settlement. Notice of settlement may accompany notice of class action status under Rules 23(b)(3) and (c), of course, and if the class action has been filed only for settlement purposes, the two will be combined with the notice of the right to opt out. This expedient effectively establishes a right to opt out of the settlement in Rule 23(b)(3) settlement-only class cases. But the individual, mailed notice of a post-certification settlement and a right to refuse to accept it are not required by the rules or by *Shutts*. Indeed, in mandatory class actions, those involving limited funds and those primarily for equitable relief, there is no right to opt out of either the class or the settlement, just as there are no rights to any form of individual notice. Even in (b)(3)-type class actions, the opt-out right that is guaranteed by Rule 23 is the one to be exercised at the time of certification, not at time of settlement.

With regard to substantive review of the agreement, the two steps in the process call for somewhat different questions to be asked about the settlement's origins and merits. In tentatively approving the pact and deciding to hold a hearing, the district court is to look to (1) the factual development of the case, (2) general impressions of reasonableness of the proposal, (3) the circumstances under which the lawyers negotiated the proposed settlement, (4) extant objections to the settlement, and (5) considerations about any attorneys' fees component of the agreement.<sup>55</sup>

In making the ultimate decision on the merits of the settlement after receiving the information presented at the fairness hearing, district courts need to compare the settlement terms with the likely result if the case were to be litigated to judgment:

First, the district court must evaluate the likelihood that plaintiffs would prevail at trial. Second, the district court must establish a range of possible recovery that plaintiffs would realize if they prevailed at trial. And third, guided by its findings

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to mount collateral challenges to the settlement if they were not afforded an opportunity to be heard in person. Additional information does have its costs, however. See Edward J. Brunet, *A Study in the Allocation of Scarce Resources: The Efficiency of Federal Intervention Criteria*, 12 GA. L. REV. 701, 740-42 (1978) (discussing informational value of permitting intervention in complex cases).

<sup>53</sup> See, e.g., *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987) (approving class settlement over objections from more than one-third of the class).

<sup>54</sup> See, e.g., *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 508 (5th Cir. 1981) (upholding settlement over objections by several named plaintiffs).

<sup>55</sup> See RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 515-16 (2d ed. 1992). Similar considerations are listed and discussed in *MANUAL FOR COMPLEX LITIGATION* § 30.41-30.42 (3d ed. 1995).

on plaintiffs' likelihood of prevailing on the merits and such other factors as may be relevant, the district court must establish, in effect, the point on, or if appropriate, below, the range of possible recovery at which a settlement is fair and adequate.<sup>56</sup>

Courts of appeal will not overturn district court decisions on the adequacy of settlements unless they find an abuse of discretion, though some courts make a more thorough review of the district court's determination than others do.<sup>57</sup> Although standards for class action settlement are better developed in the federal courts than in those of the states, the factors the state courts consider are similar as is the standard of review.<sup>58</sup>

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<sup>56</sup> *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 212 (5th Cir. 1981). Some courts apply similar considerations without explicitly listing them. *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 170-74 (2d Cir. 1987). Other courts' formulas are more baroque, but the basics of the test are the same. The Third Circuit, for example, uses nine factors:

[T]his court has adopted a nine-factor test to help district courts structure their final decisions to approve settlements . . . . Those factors are: (1) the complexity and duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining a class action; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement in light of the best recovery; and (9) the range of reasonableness of the settlement in light of all the attendant risks of litigation.

*In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 785 (3d Cir. 1995) (citing *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975)); *see also Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984) (using six-factor analysis).

<sup>57</sup> Some reviewing courts state the standard in less deferential terms than do others. *Compare, e.g., Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983) ("[For the settlement] to survive appellate review, the district court must show it has explored comprehensively all relevant factors.") (citation omitted), *with, e.g., City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974) ("[S]o much respect is accorded the opinion of the trial court in these matters that this Court will intervene in a judicially approved settlement of a class action only when the objectors . . . have made a clear showing that the District Court has abused its discretion.") (citations omitted). A number of courts make a more stringent review of settlements negotiated before class certification. *See, e.g., In re General Motors*, 55 F.3d at 787 (3d Cir. 1994); *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1323 (2d Cir. 1990); *In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 (7th Cir. 1979).

<sup>58</sup> *See, e.g., Adams v. Robertson*, 676 So. 2d 1265, 1288 (Ala. 1995) (applying seven-factor test drawn from decisions of the federal courts of appeals); *Prince v. Bensinger*, 244 A.2d 89, 93 (Del. Ch. 1968) (weighing settlement terms against probability of recovery at trial); *People ex rel. Wilcox v. Equity Funding Life Ins. Co.*, 335 N.E.2d 448, 455-56 (Ill. 1975) (deferring to the trial court's discretion and calling for a balance of the probability of success against the expense and duration of litigation); *Buchanan v. Century Fed. Sav. & Loan Ass'n*, 393 A.2d 704, 710 (Pa. 1978) (stating that "[t]he court should . . . attempt to make a reasonable

The basic evaluation that the court must make in approving a settlement of a class action is certainly the correct one from the perspective of the class members. Is the class better off settling now or taking its chances on continuing to litigate? The information that the present law of class settlement requires the court to consider is unquestionably relevant to this determination, and if the court follows the approach articulated by the courts of appeals, it will structure its decisionmaking wisely.

What the court will not do, however, is make a conclusion about whether any individual member of the class might come to a different decision. Indeed, the rule that objections, even those of class representatives, may be ignored, emphasizes the collective nature of the preference that the district court must construct. By no means does the law instruct the court to exempt objectors from the settlement, nor is the court to allow opt outs in any case in which certification has already been accomplished. The court makes a single, group choice, displacing the individual choice of the particular class members. In this crucial respect, the court goes even beyond the old idea of representation in departing from the joinder model of a class action. All the claims of the individuals meld into a single claim of the mass, and the fairness of the settlement for that imaginary claim is the question the court must answer.

### III. *AMCHEM'S* APPROACH TO SETTLEMENT OF CLASS ACTIONS

Although *Amchem* will limit the types of class actions that the federal courts will entertain, it will have only a modest impact on class settlement. The scope of the impact is determined by the somewhat unusual terms of the *Amchem* settlement itself, and by the specific matters the Court decided or left for future decision.

#### A. *The Amchem Settlement*

The *Amchem* case itself arose from the consolidation of pending federal asbestos products liability litigation in the District Court for the Eastern District of Pennsylvania. When attempts to reach a global settlement of pending cases failed, attorneys for the Plaintiffs' Steering Committee and a consortium of defendants agreed to settle the existing inventory of cases being handled by attorneys who were members of the Committee,<sup>59</sup> while at the same time launching and settling a class action case embracing the claims of persons who had been exposed to asbestos manufactured by the defendants but who had not yet filed lawsuits.

The complaint and answer were filed on the same day, as were a proposed

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estimate of the probability of success.”).

<sup>59</sup> One such agreement called for the payment of more than \$200 million to release the claims of one set of inventory plaintiffs. *See Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2239 (1997).

settlement agreement and a joint motion for conditional certification of the class.<sup>60</sup> The class, which contained no distinct subclasses, embraced all persons who had not filed an asbestos-related lawsuit against one of the defendants as of January 15, 1993 (the filing date) who had been exposed, either occupationally or through the occupational exposure of a spouse or household member, to asbestos from one of the defendants, and all persons whose spouses or family members had been exposed in the same way but who had not yet filed suit.<sup>61</sup> The settlement of these individuals' claims called for compensation of persons with four types of disease: mesothelioma, lung cancer, some other cancers (colon, rectal, laryngeal, esophageal, and stomach cancer), and asbestosis and bilateral pleural thickening.<sup>62</sup> Some other medical claims could potentially be covered, but the settlement limited the number of "exceptional" claims falling outside the specified diagnostic categories that would receive compensation.<sup>63</sup> Ranges of damages were set for each disease category. For example, mesothelioma victims qualified for the highest compensation, a range of \$20,000 to \$200,000, with defendants proposing a level of compensation within the stated range, and a dispute resolution procedure for quarrels over diagnoses and compensation amounts.<sup>64</sup> Extraordinary claims could obtain compensation above the set range, but limits existed on the number of claims and the amount to be paid for them.<sup>65</sup> "Case flow maximums" also limited the number of claims paid per disease category per year.<sup>66</sup>

No compensation was to be allowed for loss of consortium by family members of exposed individuals, for pleural plaques without physical impairment, nor for risk of future illness, fear of future illness, or medical monitoring for those without manifest current injury.<sup>67</sup> Persons without current injury were made able to qualify for compensation at some future time if they then met the criteria for compensable disease.<sup>68</sup> Statutes of limitations were waived, but the schedule of benefits was not to be adjusted for future inflation.<sup>69</sup>

The settlement agreement further provided that class members were permitted to leave the settlement process and elect binding arbitration or a tort action. However, the numbers that could leave were limited to one percent of the total number of claims that qualified for payment in a given injury category in the

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<sup>60</sup> *See id.*

<sup>61</sup> *See id.* at 2239–40 n.5.

<sup>62</sup> *See id.* at 2240.

<sup>63</sup> *See id.*

<sup>64</sup> *See id.*

<sup>65</sup> *See id.* at 2240 n.6.

<sup>66</sup> *See id.* at 2240.

<sup>67</sup> *See id.*

<sup>68</sup> *See id.*

<sup>69</sup> *See id.* at 2240–41.



previous year, and even then punitive damages claims and claims for increased risk of cancer were waived.<sup>70</sup> The attorneys for the class were to receive fees from the settlement award, in an amount set by the district court.<sup>71</sup>

Information about the settlement accompanied the notice of the pendency of the action issued in accordance with the requirements of Rule 23(c).<sup>72</sup> Because the notice gave the class members the opportunity to opt out of the class, it effectively gave those it reached the chance to opt out of the settlement as well. The notice plan had three basic components: individual first-class mail notices to about nine thousand persons who filed suit between January 15, 1993, and the time notice was issued; efforts to identify other class members and send them individual notice; and to all others, notice through publication and through third parties.<sup>73</sup> The second and third components called for the most effort. Fifty-six unions were contacted and solicited for names and addresses of members and retired members who had worked around asbestos. Information packets were sent to over one thousand attorneys known to have previously handled asbestos cases against any of the relevant defendants.<sup>74</sup> The parties placed ads in 292 newspapers and in *Parade* magazine, developed a thirty-second television announcement, and issued press releases and public service messages.<sup>75</sup> Finally, information went to state and federal courts as well as to forty trade or other affiliative organizations known to contain workers likely to have been exposed to asbestos.<sup>76</sup> Massive numbers of information packets were sent out in response to

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<sup>70</sup> See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 282 (E.D. Pa. 1994), *vacated*, 83 F.3d 610 (3d Cir. 1996), *aff'd sub nom.* *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997). The effect of the loss of the increased risk claim was ameliorated by the settlement's reservation of the right to make an additional claim should cancer develop later. *See id.* at 282. Five years was also allowed for payment of damages that exceeded 150% of the defendants' last settlement offer. *See id.*

<sup>71</sup> *See Amchem*, 117 S. Ct. at 2241.

<sup>72</sup> *See* FED. R. CIV. P. 23(c)(2). The rule provides:

In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

*Id.*

<sup>73</sup> *See Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 320–21 (E.D. Pa. 1993).

<sup>74</sup> *See id.* at 321.

<sup>75</sup> *See id.* at 321–22.

<sup>76</sup> *See id.* at 323.

inquiries spurred by media and third-party dissemination of information.<sup>77</sup> Of those who received notice, about 87,000 individuals successfully excluded themselves from the *Amchem* class, though they were required to execute two opt-out forms (one during each of two different time periods) to do so.<sup>78</sup>

The district court conditionally certified the class under Rule 23(b)(3), approved the notice plan, heard objections to the settlement, finalized the class certification, and approved the settlement as fair and adequate.<sup>79</sup> The court went on to enjoin class members from beginning any asbestos-related suit against any of the defendants in any state or federal court.<sup>80</sup> The class members who had objected to the settlement appealed to the Third Circuit, which reversed, vacating the certification on the grounds that it did not comport with Rule 23.<sup>81</sup>

### B. *The Supreme Court's Decision*

The Supreme Court affirmed the judgment of the Third Circuit reversing the settlement, though it rejected the court of appeals' reasoning that a settlement class action had to conform to exactly the same application of the Rule 23 standards as the case would if it were to be tried.<sup>82</sup> Justice Ginsburg wrote for a six-member majority.<sup>83</sup> With regard to settlement class actions, the Supreme Court commented:

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<sup>77</sup> The district court declared:

This Court incorporates here as credible and reliable the [Settling Parties'] Final Report [on Implementation of the Notice] which stated that 35 national or international unions had run the court-approved "clip art" in the publications delivered individually to the homes of over 6 million union members and retirees, and that nine national or international unions had had notice materials mailed individually to almost 400,000 union members or retirees. The Final Report, adopted and credited here, also explained the multi-million dollar media campaign undertaken to publicize the class action and proposed settlement, and reported that over 320,000 individual notice packets and over 4,000 copies of the Stipulation had been mailed to potential class members in response to calls to the special 800-number listed in all notice materials. All in all, the Final Notice Report, adopted and credited here, stated, over 6.8 million individuals received individually delivered notice materials, and millions more were notified through media efforts.

*Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 312 (E.D. Pa. 1994).

<sup>78</sup> See *Georgine v. Amchem Prods., Inc.*, Civ. A. No. 93-0215, 1995 WL 561297, at \*4 (E.D. Pa. Sept. 18, 1995).

<sup>79</sup> See *Georgine*, 157 F.R.D. at 337.

<sup>80</sup> See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2234 (1997).

<sup>81</sup> See *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 634 (3d Cir. 1996).

<sup>82</sup> See *Amchem*, 117 S. Ct. at 2248.

<sup>83</sup> Justice O'Connor did not participate, and Justices Breyer and Stevens concurred in part and dissented in part. See *id.* at 2231.

We agree with [the settlement proponents] to this limited extent: settlement is relevant to a class certification. The Third Circuit's opinion bears modification in that respect . . . . Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial.<sup>84</sup>

This view signals an acceptance of the practice of bringing a class action case for the sole purpose of putting a settlement into place,<sup>85</sup> though the Court explicitly reserved the question whether the practice is permissible under the constitutional restriction of Article III courts to "cases and controversies."<sup>86</sup> Settlement classes have been criticized on the ground that a case that will never be tried, and that would be unmanageable if tried, has no discernable settlement value, and thus the class members will likely be under-compensated by any settlement.<sup>87</sup> This criticism falls wide, however, for the settlement class action is composed of claims that could be tried individually and thus have a settlement value which can be aggregated to make an estimate of the value of the combined case.

The Court did not credit any objection of this type in discussing settlement-only class actions, though it gave one cautionary comment in arguing that the overall settlement fairness inquiry under Rule 23(e) should not be permitted to supplant the inquiry whether the provisions of subdivisions (a) and (b) are met.<sup>88</sup> The Court commented that in settlement-only class cases, if litigation to judgment were not a realistic option and the court did not consider the (a) and (b) factors, class counsel would be "disarmed" in that they could not use the threat of litigation to obtain a better offer from the defendants, and the district court would be hampered in evaluating the settlement for lack of information obtained in adversarial investigation.<sup>89</sup> Nevertheless, the Court did not consider the settlement-only aspect of such a case—apart from its failure to meet the subdivision (a) and (b) standards—to be significant enough to condemn all settlement class cases. The threat of individual litigation can provide leverage in large-claim mass tort cases even when group litigation is unlikely.<sup>90</sup>

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<sup>84</sup> *Id.* at 2248.

<sup>85</sup> The Court also made other remarks that might indicate an acceptance of settlement-only classes, stating that the "settlement-only" class has become a stock device," and that "all Federal Circuits recognize the utility of Rule 23(b)(3) settlement classes." *Id.* at 2247.

<sup>86</sup> *Id.* at 2244.

<sup>87</sup> See Issacharoff, *supra* note 21, at 811.

<sup>88</sup> See *Amchem*, 117 S. Ct. at 2248.

<sup>89</sup> See *id.* at 2248–49.

<sup>90</sup> Moreover, as Professor Resnik notes, few cases, aggregated or not, make it to trial, whereas many of both kinds of cases are litigated through significant pretrial proceedings. See Judith Resnik, *Litigating and Settling Class Actions: The Prerequisites of Entry and Exit*, 30 U.C. DAVIS L. REV. 835, 838–40 (1997). The non-triable class action case might have a settlement value because the threat of aggregate pretrial litigation causes the defendant to fear

While rejecting the Third Circuit's demand that the case be able to be tried as a class action, the Court accepted the court of appeals' careful review of the settlement to determine whether the class members' interests were adequately represented.<sup>91</sup> The Court stated that settlement heightens, rather than diminishes, the attention courts must pay to the requirements of the class action rule concerning the predominance of common questions and the adequacy of representation.<sup>92</sup> It noted that the rule imposes the subdivision (a) and (b) requirements on all class actions, settled or not, and it questioned the ability of class counsel to negotiate a fair agreement in cases in which the standards were not met.<sup>93</sup> Although it stressed the desirability of a comprehensive solution to the asbestos litigation crisis,<sup>94</sup> it found that the class action solution adopted in the case failed because the requirements of common question predominance and representative adequacy were not met under the case's facts.<sup>95</sup>

On the topic of the predominance of common legal or factual questions, a basic requirement of Rule 23(b)(3), the Court ruled that the benefits of a settlement in providing sure and swift compensation are not relevant to the question of predominance.<sup>96</sup> Instead, the question depends on underlying legal or factual questions related to each class member's individual case, "questions that preexist any settlement."<sup>97</sup> The Court noted that though the fact of exposure to asbestos might be sufficient to meet the requirement of Rule 23(a) that there be some common question of law or fact, it was insufficient to meet the "far more demanding" requirement of Rule 23(b)(3) that the question predominate.<sup>98</sup> It cited the Third Circuit's opinion in listing non-common questions for the class members, including differences of time, method, and duration of exposure, different histories of tobacco smoking, and vast differences among exposure-only claimants and between them and persons already manifesting illness.<sup>99</sup> The Court echoed the Third Circuit's concern that differences in state law compounded the problems arising from factual disparities among the class members.<sup>100</sup>

The Court amplified the discussion of the difference among class members

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disaggregated trial results and imposes significant litigation costs on the defendant. *See id.*

<sup>91</sup> *See Amchem*, 117 S. Ct. at 2248.

<sup>92</sup> *See id.*

<sup>93</sup> *See id.* at 2248-49.

<sup>94</sup> The Court opened and closed its opinion on this theme. *See id.* at 2237-38, 2252.

<sup>95</sup> The Court did not reject any of the underlying factual findings of the district court in favor of the settlement, but stated that it was focusing on the Rule's requirements and explaining why the requirements could not be met for a class "so enormously diverse and problematic as the one the District Court certified." *Id.* at 2249-50 & n.17.

<sup>96</sup> *See id.* at 2249.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 2250.

<sup>99</sup> *See id.*

<sup>100</sup> *See id.*

by contrasting the case with class actions alleging consumer fraud, securities fraud, and antitrust violations.<sup>101</sup> Though the Court averred that mass tort cases may satisfy the predominance test, it emphasized that caution is needed when individual stakes are high and disparities among class members are great.<sup>102</sup> It repeated a statement from the Advisory Committee Note to the current rule emphasizing the likely differences among class members in mass accident cases.<sup>103</sup>

The minimum that the Court's language about predominance would appear to require is that ill claimants and exposed-but-not-yet-ill claimants need to be in two separate subclasses in toxic exposure cases such as *Amchem*. A broad reading would bar the use of a class action altogether for persons who have not yet manifested injury and would insist on some similarity in the nature of exposure and disease for those allowed to sue. Separate classes based on which state law applies (or perhaps based on which categories of law the applicable state falls into) would be required as well.

The Court also found that the case failed the test of representative adequacy: that the named parties will fairly and adequately protect the interests of the class.<sup>104</sup> The Court stated that the purpose of the test is to identify conflicts of interest between the named parties and the class members; the standard sounds both in economy and in fairness to the class members.<sup>105</sup> It also includes considerations about class counsel's competence and freedom from conflicts, considerations the Court declined to address directly.<sup>106</sup>

The Court's criticism of representative adequacy under the facts of the case centered on the diversity of interests in the "single giant class" represented by the named plaintiffs.<sup>107</sup> The Court stressed that those who currently are injured have large, immediate payments as their overriding goal, while exposure-only claimants have a conflicting interest in an ample fund to compensate future injuries, one that will be protected from potential inflation.<sup>108</sup> The settlement reflected allocation decisions and limited the defendants' total liability. Future claimants lost any adjustment for inflation and any compensation for loss of consortium; they also lost any slight chance to quit the settlement and pursue other relief. The Court admitted that an absence of separate representatives in the settlement process frees the representatives to pursue the aggregate interests of the group as a whole, but the Court emphasized the representatives' responsibilities to

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<sup>101</sup> *See id.*

<sup>102</sup> *See id.*

<sup>103</sup> *See id.* (citing FED. R. CIV. P. 23 advisory committee's note (1966)).

<sup>104</sup> *See id.*

<sup>105</sup> *See id.* at 2250-51 & n.20.

<sup>106</sup> *See id.* at 2251 n.20.

<sup>107</sup> *See id.* at 2251.

<sup>108</sup> *See id.*

pursue the objectives of a group with similar interests and to approve the settlement based only on the benefit to that distinct group.<sup>109</sup>

The Court compared *Amchem*, with its combined class, to an employment discrimination case in which persons who were denied employment are in the same class with current employees.<sup>110</sup> If the rejected applicants obtain jobs from the litigation, they will then compete with the existing employees for seniority and fringe benefits. In *General Telephone Co. v. Falcon*<sup>111</sup> the Court held that a single named plaintiff could not represent both groups. The Court's comparison of the two situations is telling. Neither *Falcon* nor any other case has forbidden rejected applicants and current employees from joining in the same litigation as long as the plaintiffs are properly subclassed according to interest. The Court thus held open the possibility that settlements in cases like *Amchem* might be proper if they are reached by representatives of distinct subclasses advocating for each groups' interests.<sup>112</sup>

The opening may have been closed, however, by the Court's comments regarding notice. Without ruling decisively on the matter, the Court expressed grave reservations about the possibility of providing notice to a class containing persons who have not yet manifested disease. Not discussing the specific, herculean efforts of the *Amchem* litigants to provide notice, the Court stressed that persons unaware of their exposure or uninformed about the risks of future impairment may be unable to fully appreciate the importance of a decision to participate or to decline to do so.<sup>113</sup> The holders of potential consortium claims, *i.e.*, future spouses and children of asbestos victims, are impossible to identify at the present time, and so, the Court emphasized, they are also impossible to notify.<sup>114</sup> The Court recognized "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous."<sup>115</sup>

As with the holding on predominance of common questions, a minimal reading of the Court's holding on representative adequacy would be that currently

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<sup>109</sup> See *id.*

<sup>110</sup> See *id.*

<sup>111</sup> 457 U.S. 147, 157-58 & n.13 (1982).

<sup>112</sup> This is not to say that a stricter application of *Falcon* would have no impact on the present world of class action litigation. One commentator has decried the courts' inattention to *Falcon*'s requirements, contending that the class members' interests demand strict application of adequacy of representation standards. See Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 649-51 (1994); Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon*, 54 OHIO ST. L.J. 607, 657-60 (1993) [hereinafter Downs, *Impact*].

<sup>113</sup> See *Amchem*, 117 S. Ct. at 2252.

<sup>114</sup> See *id.*

<sup>115</sup> *Id.*

injured individuals and those who have been exposed to a toxic product but have not manifested any injury would need to be in two different subclasses with separately named plaintiffs and attorneys, who could then negotiate with the defendants a settlement similar to the one that the District Court approved. This reading is dubiously faithful to the Court's opinion, however. The Court's discussion of the predominance of common questions identified conflicts among the members of the potential subclasses, particularly the persons who would be within the subclass of individuals who have been exposed but have not manifested injury. These conflicts would likely necessitate still further subclassing, to the point where the litigation would become difficult to manage and a settlement unlikely to emerge.<sup>116</sup> Moreover, the Court's comments on notice, though not a clear holding, cast severe doubt on the use of a class to dispose of the claims of persons who have not yet manifested injury, unless those persons can somehow be identified individually and have the significance of their claims explained to them.

The real effect of *Amchem* on the law of class action settlement is thus not a set of particular rules that settlements of class cases must conform to, but rather a limit on the kinds of cases that may be brought as class actions, and given the potential to result in a comprehensive settlement at all. The limits remain hazy.<sup>117</sup> A class case may include persons with current injuries, and possibly those with future injuries not yet manifest, but the categories of persons have to be separated, perhaps into multiple subclasses of each group. Moreover, those in the exposed-but-not-yet-ill group may not be able to be included at all unless notice requirements are somehow met. Apart from the Court's skeptical comments about allocation decisions that eliminated inflation protection and consortium claims, there were no statements on what a comprehensive toxic tort settlement would need to look like. The significance of even those comments was hedged by their insertion into a broader discussion about the procedural importance of subclassing.

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<sup>116</sup> See *id.* at 2255–56 (Breyer, J., concurring in part and dissenting in part) (“[S]ubclasses can have problems of their own. ‘There can be a cost in creating more distinct subgroups, each with its own representation . . . . [T]he more subclasses created, the more severe conflicts bubble to the surface and inhibit settlement . . . .’” (quoting JACK WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 66 (1995))); see also Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 360 (1998) (raising difficulties about compensation of subclass attorneys); Weinstein, *supra* note 18, at 506–07 (discussing additional difficulties of subclassing).

<sup>117</sup> Commentators have already marked out positions about what effects the holding will have on settlement of mass tort class actions. Compare Eric D. Green, *A Post-Georgine Note*, 30 U.C. DAVIS L. REV. 873, 873 (1997) (“*Amchem* . . . appears to have sounded the death-knell for mass tort class actions (whether settled or litigated) under the current version of Rule 23.”), with Linda S. Mullenix, *Court Settles Settlement Class Issue*, NAT’LL.J., Aug. 11, 1997, at B12 (“[I]n the end, where there is a will to resolve complex class actions, there will be a way—*Amchem* notwithstanding.”).

The concurring and dissenting opinion was equally cautious in articulating a set of rules about settlement of cases like *Amchem*. Justice Breyer, joined by Justice Stevens, agreed with the majority that settlement ought to be relevant to class certification but concluded that the case should have been remanded for further factual development about the settlement.<sup>118</sup> The opinion's main thrust was that the majority had given insufficient attention to the social need for a resolution of the asbestos litigation crisis and that the court of appeals ought to have been given the opportunity to review the district court's efforts to demonstrate that the case met reasonable standards of predominance and representative adequacy.<sup>119</sup> Justice Breyer insisted that the need for the court system to respond to the predicament of the parties is great and lends support for the settlement;<sup>120</sup> he argued that settlement ought to receive greater weight in considering the case's satisfaction of the predominance standard;<sup>121</sup> he questioned the wisdom of overturning the district court's findings on adequacy of representation without the court of appeals having considered the issue;<sup>122</sup> he questioned whether the Court's opinion gave an unjustified impression that the settlement was unfair;<sup>123</sup> and he rejected the Court's suggestion that notice was inadequate, at least in the absence of a review of the parties' and the district court's extensive efforts at notice.<sup>124</sup> Justice Breyer concluded that the Court gave too little deference to the district court's extensive review of factual materials pertaining to the fairness of the settlement.<sup>125</sup>

Although *Amchem* concerned only the federal class action rule, its reasoning is sure to be persuasive to courts construing state class action statutes and rules with similar language. Moreover, because *Shutts* establishes that minimum protections of class members' interests spring from constitutional due process, courts applying state laws will need to be careful in approving settlement classes with comparably weak degrees of common-question predominance or representative adequacy.<sup>126</sup>

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<sup>118</sup> See *Amchem*, 117 S. Ct. at 2252–53 (Breyer, J. concurring in part and dissenting in part).

<sup>119</sup> See *id.* at 2253.

<sup>120</sup> See *id.*

<sup>121</sup> See *id.* at 2254.

<sup>122</sup> See *id.* at 2256.

<sup>123</sup> See *id.* at 2257.

<sup>124</sup> See *id.* at 2257–58.

<sup>125</sup> See *id.*

<sup>126</sup> See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985) (establishing due process minima for protection of out-of-state class members' interests in class action for monetary relief).



### C. *The Amchem Non-Decision—Questions Not Decided*

The Court failed to make any of the global pronouncements that might have been expected of it regarding the general propriety of using class actions in mass tort cases, the ability of Article III courts to exercise jurisdiction in class actions brought only for purposes of settlement, and the propriety of settling inventory claims at the same time as future injury claims, for different amounts. On the first issue, the Court declared that the text of subdivision (b)(3) does not rule out classes composed of persons with individual personal injury claims for substantial damages.<sup>127</sup> Nonetheless, it urged caution, quoting the Third Circuit's statement that each class member has "a substantial stake in making individual decisions on whether and when to settle."<sup>128</sup> The Supreme Court explained that the drafters had "dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'"<sup>129</sup> The Court went on to quote a Seventh Circuit opinion stating that the basic policy behind the class action is to aggregate claims that would not create recoveries large enough to justify individual lawsuits.<sup>130</sup>

The Court's comments and quotations questioning the use of class actions to aggregate large-recovery injury claims should do little to discourage the trend towards bringing mass tort cases as class actions, for each would-be class representative will argue that the case is that rare action justifying application of the rule. As the Court stated, nothing in the text of the rule excludes those cases from certification.<sup>131</sup> The Court may also have lent some oblique encouragement by declining to give a ringing endorsement to the commonly cited 1966 Advisory Committee Note that states that a class action is generally not appropriate in a mass accident case.<sup>132</sup> However, by suggesting caution and a case-by-case approach, the Court might be bolstering the position of those circuit courts that have rejected class actions as "immature" torts on the ground that combined treatment does not make sense until there is a record of how numerous juries have treated the cases.<sup>133</sup> If the view of those circuit courts prevails, the valuation

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<sup>127</sup> See *Amchem*, 117 S. Ct. at 2246.

<sup>128</sup> *Id.* (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir. 1996)).

<sup>129</sup> *Id.* (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)). Professor Kaplan chaired the 1966 Advisory Committee, which drafted the rule.

<sup>130</sup> *Id.* (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

<sup>131</sup> See *Amchem*, 117 S. Ct. at 2246.

<sup>132</sup> The Court quoted portions of the note stating that mass accident cases present significant questions affecting different class members in different ways, and therefore class treatment is usually not appropriate. However, the Court also observed that the text of Rule 23 does not categorically forbid class certification in mass tort cases, and it acknowledged the trend towards certification of those cases. See *id.* at 2250. The Court described the Advisory Committee's language as a warning and advised caution. See *id.*

<sup>133</sup> These cases include *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996),

problem in class action settlements will diminish, but the decreased availability of class actions will produce increased judicial effort on dispersed, overlapping cases and greater delay in obtaining recoveries for plaintiffs and *res judicata* protection for defendants in mass tort injuries.<sup>134</sup>

On the second issue, that of Article III,<sup>135</sup> the *Amchem* Court simply asserted that the resolution of the appropriateness of the class certification was “logically antecedent to the existence of any Article III issues” and so had to be reached first.<sup>136</sup> In a sense, the Court was correct, for the jurisdictional problem does not arise if, as was the case in *Amchem*, the matter cannot be brought as a class action. Nevertheless, the contrary approach is equally plausible, for there would be no need to reach the appropriateness of certification if jurisdiction did not exist. The practical effect of the Court’s reservation of the issue is to cast some, though probably not overwhelming, doubt on the propriety of a class composed of persons exposed to a substance who have not yet filed suit and may not have manifested injuries.<sup>137</sup>

The reason that the doubt does not overwhelm is the strength of the argument in favor of jurisdiction for such an action. It is as logical to consider the injury to

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and *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995). The *Castano* case is criticized in Note, *Class Actions—Class Certification of Mass Torts—Fifth Circuit Decertifies Nationwide Tobacco Class*—*Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), 110 HARV. L. REV. 977, 979–80 (1997), on the grounds that it grafts a merits-based maturity test onto Rule 23. However, in light of *Amchem*, one might respond that the superiority of class action treatment (one of Rule 23’s requirements for (b)(3) cases) depends on the existence of other, prior litigation from which the court may draw valuation data in considering settlement. Cf. Heather M. Johnson, Note, *Resolution of Mass Product Liability Litigation Within the Federal Rules: A Case for the Increased Use of Rule 23(b)(3) Class Actions*, 64 FORDHAM L. REV. 2329, 2235–46 (1996) (criticizing *Rhone-Poulenc* for reversing class certification). Nevertheless, *Amchem* does not directly endorse what the courts did in *Rhone-Poulenc* or *Castano*, so the conclusion from those cases that the mass tort class action is in jeopardy is itself premature. But see Richard R. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 301–09 (1996) (heralding the demise of the mass tort class action on the basis of cases such as *Rhone-Poulenc* and the Third Circuit’s decision in *Amchem*).

<sup>134</sup> See Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 519 (1996) (explaining systemic benefits from consolidation of similar litigation).

<sup>135</sup> Many authorities have questioned the existence of Article III jurisdiction in settlement class actions such as *Amchem*. See, e.g., Coffee, *supra* note 18, at 1422–33 (1995); Note, *Back to the Drawing Board: The Settlement Class Action and Limits of Rule 23*, 109 HARV. L. REV. 828, 833 (1996); see also *Amchem*, 117 S. Ct. at 2244 (describing objection).

<sup>136</sup> *Amchem*, 117 S. Ct. at 2244.

<sup>137</sup> The Court intimated its strongest reservations on the question whether exposure-only claimants without manifest injuries have claims at all, specifically ones that satisfy the jurisdictional minimum for a diversity class action. See *id.* at 2244–45 n.15. As noted in the text, the resolution of this question should depend on whether the applicable state law recognizes an exposure-only claim. As for the size of the claims, 28 U.S.C. § 1367 may eliminate the jurisdictional minimum for diversity class members. See sources cited *supra* note 44.

be the exposure to a toxic substance as it is to consider the injury to be the manifestation of disease from the exposure. There is more sense in counting time for application of statutes of limitations purposes from the date of manifestation, because many people do not know whether they have been exposed. However, the result is the same if one characterizes the inapplicability of the limitations bar as tolling as it is if one calls it non-accrual of the action.

On a more general level, federal courts have always applied case-and-controversy requirements flexibly, frequently permitting suit when injury is threatened, or conditioned on an event that has not yet occurred.<sup>138</sup> For example, a long line of Supreme Court precedent allows jurisdiction to challenge a defendant's practice when the conduct has ceased but the defendant is free of any court order keeping it from returning to its prior ways.<sup>139</sup> Practical necessity leads to justiciability, and apart from a class action, there may be no practical way to achieve finality in mass torts at a reasonable expenditure of judicial and litigant resources.<sup>140</sup> Moreover, as a professor who served as special master in an asbestos class action pointed out, the contrary "argument proves too much. If settlement ended the case or controversy requirement, there could not be consent settlements or consent judgments in many cases."<sup>141</sup> Default judgments could be added to the list. The separate question of whether persons whose injuries have not manifested themselves have a justiciable case is actually a question of underlying state law, *i.e.*, whether the state considers exposure to a toxic substance without pathology the accrual of a cause of action.<sup>142</sup> The claim would be fully ripe at least in those states that have not foreclosed a cause of action for fear of disease, medical monitoring, or the probability of future harm.<sup>143</sup>

The Court also avoided taking any position on the third issue, the ethical controversy about settling inventory claims for larger recoveries than those received by class members who had not previously filed suit. Commentators

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<sup>138</sup> See ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* § 2.1, at 45 (2d ed. 1994) (discussing balance between judicial restraint and necessity to uphold underlying law in justiciability decisions).

<sup>139</sup> See, *e.g.*, *United States v. W.T. Grant Co.*, 345 U.S. 629, 635 (1953) (finding case to be justiciable); CHERMERINSKY, *supra* note 138, § 2.54, at 136–39 (discussing doctrine and collecting authorities).

<sup>140</sup> See Mullenix, *Constitutionality*, *supra* note 19, at 635–37.

<sup>141</sup> Green, *supra* note 19, at 796.

<sup>142</sup> See *id.*

<sup>143</sup> See *id.* Note that federal courts have jurisdiction over cases that lose as well as those that win. A case or controversy exists as long as the claim is colorable. Hence, the argument that the plaintiff should recover under the applicable law for exposure without manifestation need be no more than non-frivolous. Similarly, the good-faith relinquishment of a doubtful claim will provide consideration for an enforceable contract of settlement. See RESTATEMENT 2D CONTRACTS § 74, at 185 (1981). Damages have been awarded for mere fear of future disease after exposure to a toxic product. See, *e.g.*, *Cantrell v. GAF Corp.*, 999 F.2d 1007, 1012 (6th Cir. 1993) (holding damages for fear of asbestos disease was proper).

pressed the ethical objection to an attorney negotiating a deal that provides greater recovery for clients with cases already on file than that which the attorney negotiates for absent class member clients whose cases have not yet been filed.<sup>144</sup> Because the fixed schedule of damages available to *Amchem* class members was so much lower than the damages received by inventory plaintiffs whose cases were settled at the same time, observers drew the inference that the class members were being sold out for the benefit of the persons who had already filed suit and their attorneys.<sup>145</sup>

The district court responded to this argument by noting that in the general practice of personal injury litigation, plaintiffs with cases on file are usually able to negotiate better deals than similar individuals who have not yet sued: the plaintiffs have already engaged a lawyer, have usually invested substantial costs, have a place in the progression towards trial, and have firmer expectations of recovery.<sup>146</sup> The court also stressed that obtaining different representation would have created other, worse problems for the class.<sup>147</sup> Because of their experience with trying and settling asbestos matters, the class counsel were able to present the most credible negotiating posture to the defendants in settling the class case.<sup>148</sup> The bar of experienced, successful plaintiff asbestos lawyers is limited, and it is unrealistic to expect its members not to have an inventory of already-filed cases subject to settlement negotiations.<sup>149</sup> The Supreme Court may well have seen no easy answer to this dilemma and so avoided commenting on it altogether.

#### *D. The Impact of the Decision on Class Action Settlement*

*Amchem* thus left the law of settlement of class actions altered, but in a somewhat ambiguous way. Settlement class actions are not forbidden. Joinder of very disparate claims into a large class action is permitted, but the district court must subclass all groups with divergent interests. At the very least, a court must

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<sup>144</sup> See Koniak, *supra* note 20, at 1119–22 (noting the importance of eliminating collusion in class settlements); see also Cramton, *supra* note 20, at 832 (advocating courts making detailed inquiries about side settlements involving future claimants); Issacharoff, *supra* note 21, at 832 (citing the risk involved for unrepresented future claimants because settlement was more tolerable to current claimants).

<sup>145</sup> See sources cited *supra* note 144.

<sup>146</sup> See *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 328 (E.D. Pa. 1994).

<sup>147</sup> See *id.*

<sup>148</sup> See *id.* (stating “[m]oreover, it was the very fact that Class Counsel represented such a substantial number of present clients, as leaders of the asbestos bar, that made them credible and appropriate counsel to negotiate on behalf of an inchoate futures class”).

<sup>149</sup> See Green, *supra* note 19, at 797–98 (arguing that the years class lawyers typically spend on claims makes them “knowledgeable and capable lawyers”); see also Deborah R. Hensler, *A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1587, 1596 (1995) (noting that the concentration of cases in a few firms is a characteristic of mass tort litigation).

separate those with current injuries from those whose injuries are not yet manifest. Subclassed groups of not-yet-manifestly injured persons may be able to approach the court, but only if their members can receive notice sufficient to guide their decisions about what to do when there. And there remain serious, unanswered questions about justiciability of claims of those who have not manifested injury, and about the ethics of allowing those persons to be represented by lawyers who also represent persons with current injuries. With these restrictions on the general applicability of the class action device, settlement may continue under most of the same standards and procedures as before.

#### IV. WEAKNESSES OF THE *AMCHEM* APPROACH TO CLASS ACTION SETTLEMENT

The *Amchem* Court's approach to class action settlement centers on strict tests of predominance of common questions and representative adequacy, to be applied in any class action but especially those that are settled. This approach, however, risks eliminating useful class action cases though it does not fully protect the interests of class members. In addition, there are problems with the Court's theoretical interpretation of the common question predominance and representative adequacy requirements. Finally, there are also problems with the practical application of the Court's interpretation to concrete examples of class action settlements.

##### *A. Difficulties with the Court's Interpretations of Common Question Predominance and Representative Adequacy*

The predominance test sprang from the concern of the drafters of the 1966 Rules amendments that the Rule 23(b)(3) class action joins claims that are more disparate in nature than the claims handled under other subdivisions of the Rule. A subdivision (b)(3) class lacks the coherence of a (b)(1) class, in which the interests of the members are so closely tied that they cannot be treated differently.<sup>150</sup> The drafters also believed that the interests of (b)(3) class members were less uniform than those of subdivision (b)(2) class members, who had been treated the same way by the defendant and who were seeking injunctive relief.<sup>151</sup>

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<sup>150</sup> See FED. R. CIV. P. 23(b)(1)(A)–(B).

<sup>151</sup> See Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure* (I), 81 HARV. L. REV. 356, 389–90 (discussing subdivision (b)(2) and noting purposes of subdivision (b)(3)); see also FED. R. CIV. P. 23 advisory committee's note (1966) ("*Subdivision (b)(3)*). In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending on the particular facts."). I have argued elsewhere that this belief was always incorrect with regard to subdivision (b)(2), and it drifted even further from reality as lawyers used Rule 23(b)(2) in a wide range of

The drafters believed that if a case fails to meet (b)(1) or (b)(2) standards, class treatment only serves the interests of uniformity and efficiency when the questions common to the class predominate over the questions affecting individual members.<sup>152</sup>

Considered as a classification to achieve the drafters' purposes, *Amchem's* strict interpretation of the predominance test is badly over-inclusive and under-inclusive.<sup>153</sup> It is over-inclusive in that many cases will meet *Amchem's* interpretation of predominance, as well as the other requirements of class certification, and still be poor candidates for class treatment. Even persons with similar injuries from similar exposure to the same defendant's product may still have vastly different priorities about the balance between individualized treatment and speed in the assessment and payment of compensation. Family financial conditions, availability of collateral sources of compensation, and degree of psychological aggrievement all vary widely from individual to individual, even apart from the risk preferences that will be discussed below. A single representative is not necessarily able to fashion a litigation strategy that will satisfy these interests, even when common factual or legal issues dominate the case.

The *Amchem* interpretation of predominance is under-inclusive in that at least partial class-action treatment confers advantages of economy, while preserving fairness interests, in nearly any case in which a large number of plaintiffs sue a common defendant for exposure to the same product. Rule 23(c)(4) permits a class to be maintained with regard to a particular issue or issues. Despite the disparities among the members of a class like *Amchem's*, there is no reason to eschew the efficiencies of classwide determinations on such issues as whether a reasonable finder of fact could determine general causation in the plaintiffs' favor, or whether the government-contractor defense shields one or another defendant from all claims. Class treatment may be appropriate for a wide range of discovery or evidentiary disputes pertaining to particular defendants. The Court should have placed less stress on the differences among the class members and reserved the emphasis for the relation between the differences among the class members and the issues to be decided.

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circumstances after 1966. See Weber, *supra* note 27, at 386-94.

<sup>152</sup> See FED. R. CIV. P. 23 advisory committee's note (1966) ("[In subdivision (b)(3) cases, i]t is only where this predominance exists that economies can be achieved by means of the class action device.").

<sup>153</sup> The discussion here is not meant to be an evaluation of constitutionality, but only of effectiveness. Of course, a similar framework is used in evaluating legislation to determine whether it satisfies equal protection standards. See GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 568-70 (3d ed. 1996); Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 370 (1949) (stating such cases raise the problem of "justifying the exclusion from the regulation of persons and activities similarly situated but left untouched"); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (applying framework in equal protection case).

In a sense, of course, any interpretation of predominance under includes, for the requirement fails to apply at all in subdivision (b)(1) and (b)(2) class actions, though there may be strongly disparate interests among the members of those classes.<sup>154</sup> As discussed below, Rule 23(b)(1)(B) has recently been applied to a mass asbestos case, even though there was very little evidence that the potential sum of recovery was fixed and that individual recoveries by some class members would be dispositive of the claims of others.<sup>155</sup> To the extent that applying a predominance test might have protected class members, the court subverted that interest by simply bypassing Rule 23(b)(3) and using a different subdivision of the Rule.<sup>156</sup>

Weaknesses also exist in the *Amchem* approach to representative adequacy. The difficulties mirror those of the Court's treatment of predominance, for the test assumes that those who were injured in a similar way necessarily have the same interests and thus can be represented by any of that duly limited cohort. However, the interests do not necessarily track the injuries, and may well track considerations that are wholly idiosyncratic. Moreover, the financial pressure on plaintiffs' lawyers to settle will present a conflict overshadowing those among injured individuals, even if the representative is drawn from a strictly limited group.

Any rule or rule interpretation that limits the availability of class actions places injured plaintiffs at a disadvantage, not just because of the lost economies of class treatment and the lost leverage from combining claims, but also because of the problem of queuing. Mass tort injuries are particularly prone to create long trial queues because the number of cases multiplies rapidly once a few gain publicity, and the cases, especially those based on occupational exposure, frequently are geographically concentrated, swamping particular judicial districts.<sup>157</sup> Defendants contribute to the immediate glut by refusing otherwise advantageous settlements because they hope to deter future litigation and fear settlements may bring still more cases out of the woodwork.<sup>158</sup>

Delay caused by the queue decreases the settlement value of any individual

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<sup>154</sup> See Weber, *supra* note 27, at 365–67, 386–87; see also YEAZELL, *supra* note 26, at 253 (“[I]t is much more likely [in (b)(2) cases] than in (b)(3) cases that the interests of the group’s members will conflict and will be least amenable to abstract assessment.”).

<sup>155</sup> See *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997), *reaff’d*, 134 F.3d 668 (5th Cir. 1998). But see *infra* text accompanying notes 326–29 (criticizing the Fifth Circuit’s position). See generally Marcus, *supra* note 21, at 878 (“Whatever its viability in other cases, the limited fund concept does not work well in mass tort litigation . . . . Only by the sleight of hand of assuming the desired substantive result . . . can the federal court find such a limited fund as a matter of law.”).

<sup>156</sup> See *infra* text accompanying notes 326–29.

<sup>157</sup> See Deborah R. Hensler, *Trends in Tort Litigation: Findings from the Institute for Civil Justice’s Research*, 48 OHIO ST. L.J. 479, 495–96 (1987).

<sup>158</sup> See *id.* at 496.

case.<sup>159</sup> If the likely delay is infinite, the settlement value drops to zero. The problem with finite judicial resources, as well as finite resources of expert time, attorney time, and judicial patience is that queuing time begins to approach infinity for some plaintiffs: cases may need to wait decades, while the defendants casually impose continuing litigation costs on the plaintiffs.<sup>160</sup>

Class action litigation is a way to bring everyone in the class to the head of the line, to get a single adjudication for all with no one involuntarily left on a waiting list.<sup>161</sup> In the settlement of a class action, both sides can be expected to exploit the caseload glut. The plaintiff class representative can threaten a judgment for all claims that will bring the total impact of recovery home to the defendant. The defendant, on the other hand, can threaten to oppose class treatment unless a favorable offer is accepted, knowing that many class members would settle cheaply to avoid a long delay in any payment through the court system.<sup>162</sup> Quite apart from the burden on the court system stressed by both the majority and the dissent in *Amchem*, the crush of asbestos litigation and similar mass product actions places a burden on each claimant. Class action litigation can lighten or eliminate that burden, even when the class is less than totally coherent and the representative less than wholly single-minded. The goal is to find a way for aggrieved individuals to proceed as a class, yet still be able to protect their own individual interests.

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<sup>159</sup> See HANS ZEISEL ET AL., *DELAY IN THE COURT* 128 (2d ed. 1978).

<sup>160</sup> In one large asbestos consolidation involving a sampling procedure proposed by plaintiffs for calculating damage awards, the trial judge spoke about the queuing difficulty in the language of due process:

[A] due process concern remains that is very troubling to the Court. It is apparent from the effort . . . to try . . . 160 cases, [so far,] that unless . . . some . . . procedure that permits damages to be adjudicated in the aggregate is approved, these cases cannot be tried. Defendants complain about the 1% likelihood that the result would be significantly different. However, plaintiffs are facing a 100% confidence level of being denied access to the courts. The Court will leave it to the academicians and legal scholars to debate whether our notion of due process has room for balancing these competing interests.

*Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 666 (E.D. Tex. 1990).

<sup>161</sup> See Kenneth R. Feinberg, *Response to Deborah Hensler, A Glass Half Full, a Glass Half Empty: The Use of Alternative Dispute Resolution in Mass Personal Injury Litigation*, 73 TEX. L. REV. 1647, 1650 ("Aggregation is a problem, but it is one way to prevent a three, five, seven, or nine-year delay in bringing cases to trial."). As the court stated in *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 473 (5th Cir. 1986), "[i]t seems that the defendants enjoy all of the advantages . . . of the class action—with one exception: the cases are brought to trial."

<sup>162</sup> On this point, the *Amchem* settlement is suspect. The case flow maximums that *Amchem* allowed for each disease category replicated the result that the queue would have had if the individual cases had been litigated to judgment.



## B. Examples of Difficulties with Settlement Under the Court's Approach

The overriding objection to the Supreme Court's approach as it applies to settlement is a practical one, based on the experience of litigants and lower courts with class action settlement. The Court's approach presents a risk that useful cases will not be brought, and valuable settlements will not be achieved, because of strict application of the predominance and representative adequacy tests. Examples include the *Silicone-Gel* case, the litigation concerning exposure to the defoliant Agent Orange, and the Dalkon Shield product liability action. It is also possible to imagine many cases in which the Court's approach will have no impact, a result that may in itself be unfortunate.

### 1. The Silicone Gel Implant Case

The settlement in the *Silicone Gel* case included all manner of injured and uninjured women who had received implants manufactured by the defendants; it even included those who had already filed suit.<sup>163</sup> The class representatives had to contend with the same conflicting interests found to be present in *Amchem*. The older and more severely injured of the class members would logically want large, immediate payment. The individuals with symptoms more likely to have been caused by the implants than conditions possibly traceable to other causes would be more prone to hold out for damages that would approximate those available from the tort system. Individuals without symptoms would want a fund preserved to pay for future medical expenses and would probably want a way to get out of the deal if the funded benefits fell short.

The agreement that the representatives negotiated, however, did a remarkable job at satisfying the likely interests of the disparate members of the class.<sup>164</sup> The terms did not feature the case-flow maximums of the *Amchem* settlement, and provided scheduled benefits to many whose injuries might have been due to causes other than the implants.<sup>165</sup> Persons with unscheduled diseases gained an additional opportunity to opt out once the diseases occurred.<sup>166</sup>

Most importantly, the agreement provided for individual choice to take the deal or not, with none of the notice problems present in the *Amchem* case. Only those identified and given notice were to be precluded, and then only if they did

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<sup>163</sup> See *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 114580, at \*1-4 (N.D. Ala. Apr. 1, 1994) (defining class).

<sup>164</sup> See Coffee, *supra* note 18, at 1404-10 (praising settlement). See generally Marcus, *supra* note 21, at 866-71 (contrasting *Silicone Gel* settlement with the settlement in *Amchem* and other cases).

<sup>165</sup> See *Silicone Gel*, No. CV-92-P-10000-S, 1994 WL 578353, at \*8-9 (N.D. Ala. Sept. 1, 1994) (corrected opinion of *Silicone Gel*, 1994 WL 114580) (describing disease compensation program).

<sup>166</sup> See *id.*

not exclude themselves from the class.<sup>167</sup> Thus the individual could decide for herself whether, under all the circumstances, the proposal was one she desired to accept. The compromise even included a later opportunity to opt out if the defendants' payments to the fund did not provide adequate benefits, albeit with those later opt-out claimants losing the right to punitive damages.<sup>168</sup>

Ultimately, the settlement did not go forward as drafted, because so many individuals filed claims that the likely decreases in benefits levels made the deal unlikely to be desirable to many class members. In addition, so many claimants opted out that the deal was no longer desirable for the defendants.<sup>169</sup> Many of the opt outs were non-United States claimants dissatisfied with the lower benefits provided them under the settlement. Good grounds existed for lesser benefits to claimants from overseas: *forum non conveniens* doctrine might well have kept them out of United States courts, and the damages available in foreign courts would have been lower or, in some instances, nonexistent.<sup>170</sup> Nevertheless, claimants had the choice to make, and many chose to exit. The case thus illustrates not only the primary point, that attractive settlements can come from class cases not allowed by *Amchem*, but also an important secondary point, that no one but the class member herself can determine what is a good settlement for her. A tertiary, but also significant, point is that the combination of a good settlement and adequate notice may cause more people to make claims than the settling parties anticipate. Therefore, the number of claims may be a better indication of the quality of the settlement than the process considerations identified by *Amchem*.

## 2. The "Agent Orange" Litigation

Other cases also demonstrate that attractive settlements can come from cases whose common-question predominance and representative adequacy may not measure up to *Amchem* standards. The "*Agent Orange*" litigation was a mass tort class action that lumped into one class veterans who had been exposed and developed symptoms with others who had not manifested illness. The class members' claims were potentially governed by a variety of different states'

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<sup>167</sup> See *Silicone Gel*, 1994 WL 114580, at \*2, 11-14 (granting preliminary approval of the opt out and notice provisions); *Silicone Gel*, 1994 WL 578353, at \*2-6 (granting final approval of the opt out and notice provisions).

<sup>168</sup> See *Silicone Gel*, 1994 WL 578353, at \*7-9 (describing later opt-out rights).

<sup>169</sup> See *In re Dow Corning Corp.*, 211 B.R. 545, 549-53 (E.D. Mich. 1997) (describing collapse of settlement). Nevertheless, a successor plan has been established which is currently paying claims. See Vairo, *supra* note 17, at 110 n.161 (citing newspaper accounts of the disbursements).

<sup>170</sup> For a more elaborate discussion of the disparities between domestic and foreign claimants' abilities to recover in absence of the class action settlement, see *Silicone Gel*, 1994 WL 578353, at \*13-17.

laws.<sup>171</sup> Nonetheless, the committee of plaintiffs' lawyers and counsel for the defendant worked out a settlement that awarded a prospect of significant enough compensation to 240,000 class members to earn their agreement.<sup>172</sup> The remaining class members were free to continue to litigate, did so, and lost.<sup>173</sup>

### 3. *The Dalkon Shield Case*

The Fourth Circuit's Dalkon Shield case, *In re A.H. Robins Co.*,<sup>174</sup> also exemplifies a desirable class action settlement that arose from a process rejected by *Amchem*. Although by the time of final disposition the matter was under supervision of a bankruptcy court and so resembled a Rule 23(b)(1)(B) case somewhat more than a subdivision (b)(3) class action,<sup>175</sup> the class of creditors whose cases were settled included a group of 195,000 women who claimed injury from use of the device.<sup>176</sup> The court did not create separate subclasses for claimants with greater and lesser injuries or diseases of particular kinds, nor did it appoint separate representatives for individuals with various sorts of symptoms.<sup>177</sup> Nevertheless, the \$2.475 billion settlement earned the support of

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<sup>171</sup> See *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 173-74 (2d Cir. 1987) (also holding that settlement was reasonable).

<sup>172</sup> See *id.* at 171. It appears that without the intervention of the district judge, pushing the plaintiffs' committee to take \$180 million, the defendants' offer would have been an even more generous \$200 million. See PETER SCHUCK, *AGENT ORANGE ON TRIAL* 159 (1986). On the other hand, if before the settlement the district judge had issued the same decision on the merits that he ultimately did, there would have been no recovery at all.

<sup>173</sup> See *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1256-64 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

<sup>174</sup> The case has two relevant reported opinions, both with the title "*In re A.H. Robins Co.*," 880 F.2d 709 (4th Cir. 1989) (affirming certification of class and approval of settlement) and 880 F.2d 694 (4th Cir. 1989) (affirming various anti-suit injunctions). Also of interest is an opinion of the same title interpreting alternative dispute resolution provisions of the settlement. See *In re A.H. Robins Co.*, 109 F.3d 965 (4th Cir. 1997) (holding that ADR rules places the burden of proving causation upon plaintiff). The Supreme Court in *Amchem* went out of its way to list *A.H. Robins* as one of the cases that had erroneously relied on the existence of the settlement in determining the appropriateness of class treatment of the case. See *Amchem Prods., Inc. v. Windsor* 117 S. Ct. 2231, 2247 (1997).

<sup>175</sup> The Fourth Circuit was persuaded that one aspect of the case concerning the liability of an insurer led to proper certification of the class under subdivision (b)(1)(A), on the ground that risks of inconsistent adjudication existed with regard to the insurer's liability. See *A.H. Robins*, 880 F.2d at 742.

<sup>176</sup> See *A.H. Robins*, 880 F.2d at 697.

<sup>177</sup> Professor Vairo, who serves as chair of the Dalkon Shield Claimants Trust, recognized this fact in her article describing the Trust's successful operation. See Vairo, *supra* note 17, at 159 ("In any event, the Dalkon Shield litigation, the asbestos litigation, and now the tobacco litigation all raise the kind of conflict of interest considerations discussed by the Supreme Court in *Amchem*.").

94% of the 139,605 claimants who voted on the plan.<sup>178</sup> Most significantly, the settlement provided an individual component of choice beyond the group-voting procedure. Once the compensation system went into operation, if the claimant chose not to accept an individually tailored offer from a dispute resolution facility, she could elect a jury trial or arbitration.<sup>179</sup>

The *Silicone Gel*, “*Agent Orange*,” and Dalkon Shield settlements were good settlements in that they offered large, immediate, relatively certain recovery to all claimants with significant injuries and a good likelihood of causation, while making plaintiffs with weaker claims no worse off than they would be in the tort system. But more important than the attractiveness of the settlements in the estimation of academic observers, or the judges who would otherwise have tried the cases, is the reality that in each case the class members were afforded the opportunity to accept or reject the settlement.<sup>180</sup> Each individual could weigh the merits of accepting the deal or refusing it. This element of choice goes far to redeem whatever flaws the *Amchem* Court might have identified in the framing of the cases and their settlement proposals.

#### 4. *Implications of the Examples*

The three previously discussed cases are all mass tort actions, chosen because *Amchem*’s implications are clearest for cases that resemble it on the facts. The impact of the case on the settlement of consumer or securities cases may be less

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<sup>178</sup> See *A. H. Robins*, 880 F.2d at 698. Because the claimants constituted a class of creditors in the bankruptcy proceeding, the disposition was put to a vote. See *id.* at 697–98.

<sup>179</sup> See *id.* at 744. The court commented that the provision “is everything that an express opt-out provision could give a class member if such a right is required under due process.” *Id.* at 745. A number of incentives operated to induce claimants to opt for compensation determinations other than jury trial. See generally Vairo, *supra* note 17, at 123–56 (describing the full operation of the trust).

<sup>180</sup> As noted, there were some differences among the cases on the timing and content of the choice involved. As a bankruptcy matter with a limited fund, the Dalkon Shield case offered a reduced choice, but one of importance nonetheless. Also worth mentioning, on the topic of mass tort settlements that appear to be in the class members’ interests but were rejected by *Amchem* or its reasoning, is *In re Asbestos Litigation*, 90 F.3d 963 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997), *reaff’d*, 134 F.3d 668 (5th Cir. 1998), *cert. granted sub nom. Ortiz v. Fibreboard Co.*, 118 S. Ct. 2339 (1998), an asbestos exposure class action that bears a close parallel to *Amchem*. The settlement in “*Asbestos Litigation*” provided generous compensation for at least some class members, although the defendant demanded global peace before parting with 1.535 billion dollars of insurance assets and so insisted on a mandatory class. See generally Green, *supra* note 19, at 798–99 (describing settlement). Had the class not been mandatory, the case would have been a settlement that many class members would likely have endorsed. However, its satisfaction of subsections 23(a) and (b) was likely identical, or perhaps weaker, than *Amchem*’s. Nevertheless, the court’s treatment of the case as a mandatory class action under Rule 23(b)(1), which restricted the class members from accepting or rejecting the settlement individually, certainly is objectionable. See *infra* text accompanying notes 326–29.

severe, but the impact on employment cases could more closely resemble the impact on tort matters. In employment cases, interests of different workers frequently diverge, and some courts have found it convenient to retreat from a strict application of *General Telephone Co. v. Falcon*,<sup>181</sup> which the *Amchem* Court relied upon so heavily.<sup>182</sup> Many employment actions are brought under Rule 23(b)(2), which does not have a common-question predominance requirement, but application of subdivision (b)(2) to those cases remains a debatable matter.<sup>183</sup> Furthermore, the representative adequacy standard, which applies fully to (b)(2) classes, could still create difficulties. As I have argued previously, subdivision (b)(2) actions should either have (b)(3)-type rights of notice and opt out, or they should not have preclusive effects.<sup>184</sup> Nevertheless, raising standards relating to the presence of common questions and representative adequacy is not the way to achieve fairness and efficiency in these cases. Detering the initiation and settlement of employment class actions would be a significant, unintended, negative consequence of heightening the standards of common question predominance and representative adequacy.

*Amchem's* marginal negative impact on the initiation of federal mass tort cases is, admittedly, not a wholly bad thing. As I have argued elsewhere, consolidated mass tort cases are better sited in the state courts, for reasons of federalism and efficiency.<sup>185</sup> But if the mass tort cases are to be consolidated in the federal courts, class action treatment does lend efficiency, and good settlements should not be impeded. Moreover, *Amchem* will inevitably have a negative effect on mass tort class actions in the state courts, making them more difficult to bring and to settle. The effects will appear immediately in those states whose class action rules or statutes mimic Federal Rule 23, but even states applying other formulas will need to weigh whether the Supreme Court might interpret the due process clause to require what the Court believed Rule 23 does.<sup>186</sup> To avoid that difficulty, state courts may interpret their rules in

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<sup>181</sup> 457 U.S. 147, 160–61 (1982) (holding that single class could not contain both employees who were denied promotion and applicants denied employment).

<sup>182</sup> See *Amchem Products, Inc. v. Windsor*, 117 S. Ct. 2231, 2250 (1997); see also *Downs, Impact*, *supra* note 112, at 708–10 (criticizing courts for failing to follow precedent of *General Telephone Co. v. Falcon*).

<sup>183</sup> For an influential exploration of this topic, see George Rutherglen, *Notice, Scope, and Preclusion in Title VII Class Actions*, 69 VA. L. REV. 11, 25–27 (1983) (discussing certification of employment cases under 23(b)(2)).

<sup>184</sup> See Weber, *supra* note 27, at 400–03. A recent decision reversing a district court's granting of opt-out rights in a subdivision (b)(2) settlement is *Thomas v. Albright*, 139 F.3d 227, 234–37 (D.C. Cir. 1998) (holding district court abused its discretion).

<sup>185</sup> See Weber, *State Courts*, *supra* note 16, at 220–59.

<sup>186</sup> In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985), the Court interpreted due process to impose procedural safeguards in state-court, multi-state class actions for monetary relief that are identical to the safeguards found in Rule 23(b)(3). *Amchem's* chilling effects on state court class certification have already appeared. See *Ford v. Murphy Oil*

accordance with *Amchem*'s reading of Rule 23.

### 5. A Non-Example: Coupon Settlements

Although the Supreme Court's approach will make some desirable settlements less likely, it will have no practical effect on coupon settlements, which have been the subject of much criticism in recent years.<sup>187</sup> These settlements have been used in consumer fraud and other cases in which the real damages sustained by most class members are low, and the cost of litigating any particular claim is higher than the individual recovery. A coupon for a discount on a future purchase is provided in full satisfaction of the class member's non-personal injury claim over a defective or unlawfully marketed product.<sup>188</sup> Although the settlements purport to have an astronomical monetary value,<sup>189</sup> accurate valuation is frequently impossible because of the prevalence of other discounts and marketing devices.<sup>190</sup> Moreover, customers frequently lack the ready cash to make use of coupons for future purchases,<sup>191</sup> transfer of coupons usually is difficult,<sup>192</sup> and many disenchanted consumers would never buy the same product, or even a different product from the same company, at any price.

Nevertheless, in some instances, accepting the coupon for a later purchase

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U.S.A., Inc., 703 So. 2d 542, 551 (La. 1997) (reversing certification on grounds that no common questions predominated over individual issues); *State ex rel. Byrd v. Chadwick*, 956 S.W.2d 369, 388–89 (Mo. Ct. App. 1997) (remanding for new notice, though largely on authority other than *Amchem*). But see Elizabeth J. Cabraser, *Life after Amchem: The Class Struggle Continues*, 31 LOY. L.A. L. REV. 373, 377–78 (1998) (acknowledging *Ford*, but contending that state courts will emerge as forum of choice for mass tort class actions in wake of *Amchem*).

<sup>187</sup> See generally Note, *In-Kind Class Action Settlements*, 109 HARV. L. REV. 810 (1996) (citing cases and critical commentary on coupon settlements). The leading case in the federal courts is *In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 800–04 (3d Cir. 1995) (holding that courts are required to make findings that the rules governing class certification have been met, regardless of whether it was certified for settlement purposes). Some aspects of *General Motors* would need modification in light of *Amchem*. See *Amchem*, 117 S. Ct. at 2243 (discussing *General Motors* decision); see also *id.* at 2248 (finding, contrary to the Third Circuit approach, that a class action certified for settlement need not be suitable for trial management).

<sup>188</sup> See sources cited *supra* note 187.

<sup>189</sup> In *General Motors*, one expert testified that the value of the coupons given to settle non-personal injury claims regarding allegedly unsafe fuel tanks was between \$1.98 and \$2.18 billion, but the expert's estimate that between 34% and 38% of the class would use the coupon was contrary to a telephone survey showing only 14% would probably or definitely do so. See *In re General Motors*, 55 F.3d at 807.

<sup>190</sup> See *id.* at 807–08.

<sup>191</sup> See *id.* at 808.

<sup>192</sup> See, e.g., *id.* at 809 (discussing transfer options in *General Motors*).

may be a rational decision for a given class member,<sup>193</sup> even when the proposal for the settlement originated in a case lacking predominance of common issues and having a questionable representative. The class member may be about to purchase the item the coupon discounts and would prefer a larger discount to a smaller amount in cash. For that class member, it makes more sense to accept the deal than to hold out for the prospect of less value from the litigation. A class member who feels that way should be permitted to act on the inclination. What is needed is a rule that would permit those class members to accept the settlement, without forcing such a deal on those customers who would never go near the product again.

## V. A CONSENT-BASED APPROACH TO CLASS ACTION SETTLEMENT

A new approach to the settlement of class actions, one that the *Amchem* Court did not consider, would place its emphasis on the idea of individual consent. The approach would not minimize the importance of common questions and representative adequacy in the framing of the class action, but it would stress the far more important question of whether the individual class member has the opportunity to accept or reject the settlement. Consent should matter; the consent that matters should be meaningful consent; implied consent is no substitute for real choice; and the practical effects of requiring choice will be beneficial.

### A. *The Importance of Consent*

Choice is good. Affording choice confers dignity upon those permitted to choose, as does an ordinary opportunity to make or refuse to make a contract. Sir Henry Maine observed in 1861 that the movement of progressive societies has been one "from status to contract,"<sup>194</sup> a development that allows the exercise of economic power, but also affords the freedom to accept or reject an exchange rather than having that decision made by someone else.<sup>195</sup> This capacity to choose is an important aspect of humanity and has value in itself.<sup>196</sup>

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<sup>193</sup> Coupon settlements have received the approval of appellate courts on the grounds that they are fair and adequate for class members. *See, e.g., Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1802-04 (1996) (affirming coupon settlement that gave owners of Ford Mustangs with alleged door defect \$400 off purchase price of new car bought within one year). The contention in the text is not that the settlements are desirable for all class members, or even a majority, but that they may be desirable for some and that all class members should have the chance to accept or refuse such a settlement when it is proposed.

<sup>194</sup> HENRY MAINE, *ANCIENT LAW* 182 (Frederick Pollock ed. 1930) (1861).

<sup>195</sup> *See* HAROLD HAVINGHURST, *THE NATURE OF PRIVATE CONTRACT* 37, 42 (1961) (discussing relationship of power and freedom of choice in the formation of contracts).

<sup>196</sup> *See* SIDNEY HOOK, *POLITICAL POWER AND PERSONAL FREEDOM* 67-68 (1959) ("Whether our choices are good or bad, wise or foolish, we feel diminished as human beings if we are prevented from making them. Denied freedom to make choices, we are denied

Moreover, with regard to settlement of class actions, only choice accommodates the diverse attitudes that litigants have towards risk. The decision to settle a case depends on a number of factors: the expected gain or loss from the litigation, the probability of winning or losing, estimates of the cost of litigating, and the litigant's willingness to risk the loss of the bargain.<sup>197</sup> Whether a settlement is possible depends upon the overlap of the range of the anticipated results from the litigation between the defendant and the plaintiff.<sup>198</sup> Whether a settlement occurs when the overlap exists depends partly on bargaining dynamics, but it also depends on the parties' preferences for risk.<sup>199</sup> It is not correct to assume that a one percent chance of winning \$100,000 is worth \$1,000, for not everyone would be indifferent about exchanging one for the other.<sup>200</sup> Many people buy lottery tickets when the probability of winning multiplied by the jackpot is a tiny fraction of the purchase price. Other people refrain from buying raffle tickets even when the prize's value multiplied by the chance of winning is higher than the ticket cost. Risk-averse people simply would prefer to hang onto what they have, rather than exchange it for a good chance of something better. Risk-preferring people are just the opposite. Every individual has his or her own risk preference, and even for a given person, the taste may change over time or vary with the amounts at stake.<sup>201</sup>

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responsibility, and to deny our responsibility is to deny our humanity.”).

<sup>197</sup> See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 522–28 (3d ed. 1986) (discussing economic model of settlement). One recent source suggests that litigants themselves are not so rationally behaved, but that lawyers steer their decisions in economically rational ways. See Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 82 (1997).

<sup>198</sup> See POSNER, *supra* note 197, at 523 (discussing settlement ranges). Another observer described the idea of a settlement range in the following language:

Except in unusual cases, the area of possible settlement is fairly broad. That is, the settlement area consists of a wide band of different prices at which it will benefit both parties to settle. This settlement area is known in economics as the ‘cooperative surplus.’ The key point for present purposes is that there is no inherently rational basis on which to divide the cooperative surplus . . . . Any division of the cooperative surplus would meet a standard of ‘fair, adequate and reasonable.’

Geoffrey Hazard, *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1267 (1995).

<sup>199</sup> See POSNER, *supra* note 197, at 525 (discussing risk preference or aversion); see also Resnik, *supra* note 90, at 854 (“[S]ome . . . [litigants] are risk-prone and some risk-averse, some one-shot players and others repeat players.”).

<sup>200</sup> See A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 53 & n.29 (2d ed. 1989) (“For example, a risk-averse person, unlike a risk-neutral person, would not be indifferent between the certainty of winning \$5,000 and a 50 percent chance of winning \$10,000. The risk-averse person would, by definition, prefer \$5,000 with certainty. Individuals may also be risk preferring . . .”).

<sup>201</sup> Professor Morawetz makes the additional point that individual class members differ in



Any class settlement, however fair in the abstract, will not be a fair exchange for those class members who would prefer to take the risk of something better. It is hardly a valid answer to say that the settlement will correspondingly overcompensate those who are sufficiently scared of risk that they would have settled for less. The insistence in the Model Rules of Professional Conduct that attorneys obtain the consent of their clients before making any settlement<sup>202</sup> bears witness to the fact that no one can determine what someone else's appetite for risk will be in any given setting.

The Model Rules' approach to settlement in individual cases is instructive in other respects for, at its most basic, a class action is one in which a single attorney represents more than one client in a consolidated case. The Model Rules of Professional Conduct<sup>203</sup> and its predecessor, the Model Code of Professional Responsibility,<sup>204</sup> have always prohibited a lawyer who represents two or more clients from making any aggregate settlement of the clients' claims unless each client consents after full consultation and disclosure. These rules recognize the importance of allowing the client the last word on whether to accept participation in a group settlement process. Although class action settlements have been viewed as an exception to the rule, made on the assumptions of necessity and homogeneity of interest, neither assumption is necessarily true. In the absence of a limited fund or other situation covered under Rule 23(b)(1), withdrawal of one or more class members from the class may be inconvenient, but it is hardly disastrous. And no matter how homogeneous the class may seem, uniformity of feelings about settlement cannot be assumed.

Recently, commentators have questioned the wisdom of applying the rule of disclosure and unanimous consent in the settlement of large-scale group litigation. Professors Silver and Baker argue that the rule unduly limits the ability of numerous individuals joined in a case against a powerful defendant to negotiate an advantageous settlement.<sup>205</sup> They contrast the large-scale group case with the

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their valuation of particular components of relief. See Nancy Morawetz, *Bargaining, Class Representation, and Fairness*, 54 OHIO ST. L.J. 1, 13-16 (1993).

<sup>202</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) ("A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter.").

<sup>203</sup> See *id.* at 1.8(g) ("A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims . . . unless each client consents . . .").

<sup>204</sup> See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106(A) (1981) ("A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims . . . unless each client has consented to the settlement . . ."). One prominent practitioner, however, has observed that current attorney practices in non-class tort cases skate on the edge of these rules. See Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 LOY. L.A. L. REV. 395, 401-07 (1998) (discussing aggregated tort cases).

<sup>205</sup> See Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 767-70 (1997) ("The Rule's non waivable unanimous consent requirement is probably the most significant barrier to settlement in mass

class action case, in which the rule of disclosure and unanimous consent does not apply, and contend that the advantage lies with a procedure in which a single individual cannot hold up a group settlement.<sup>206</sup> They propose alternate safeguards for individual litigants' interests and suggest that when clients retain an attorney they should be able to bind themselves to limiting what information will be disclosed about settlement and adopting a majority or other non-unanimous voting rule to determine which settlement offer will be accepted.<sup>207</sup>

Taken on its own terms, the proposal is dubious. True, plaintiffs who are joined as a group enjoy advantages of economy of scale, enhanced negotiating leverage, and the ability to conserve the defendant's assets.<sup>208</sup> But apart from the last advantage, which applies only when the defendant's assets constitute a limited fund, a group whose members can quit has the same benefits. When the assets are in fact a limited fund, mandatory class action treatment is appropriate, and a rule of unanimous consent should not apply.

Silver and Baker contend that privacy interests, the ability to offer global peace (preclusion of all possible claims), and the risk of strategic behavior all counsel against disclosure and unanimity.<sup>209</sup> Privacy interests, however, are subordinate to the need to monitor the group's attorney<sup>210</sup> and the group members' overriding goal of obtaining the maximum recovery. Global peace is a useful bargaining chip, but one that is overrated.<sup>211</sup> Finally, in the absence of a limited fund, strategic behavior is to be applauded, not condemned. It represents the individual plaintiff striving to obtain the highest recovery for his or her injuries. If plaintiffs with the most valuable claims reject the settlement (as Silver and Baker predict at one point in their discussion),<sup>212</sup> that is because the settlement does not afford them adequate compensation in light of the likely outcome of an individual trial. If plaintiffs with smaller claims reject the settlement, attempting to squeeze the defendant and other plaintiffs who want to

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lawsuits. . . .").

<sup>206</sup> See *id.* at 767.

<sup>207</sup> See *id.* at 770-78 (arguing the advantages and safeguards of a voting system).

<sup>208</sup> Silver and Baker are also correct in contending that agency principles do not require a rule of unanimity. See *id.* at 770-73. Nevertheless, for reasons explained in the text, the better position on the underlying conclusion is that the protection of Rule 1.8 should be nonwaivable.

<sup>209</sup> See *id.* at 750-56.

<sup>210</sup> Silver and Baker note the severity of the agency problem for group counsel and suggest some ways of ameliorating it. See *id.* at 774-75 (advocating the use of uniform commission arrangements, such as the standard contingent percentage fee). However, it is difficult to imagine that any safeguard could work if the clients have all bound themselves to receive only limited information about the settlement. Needless to say, the form of the agreement will be drafted by the lawyer whose interests will diverge from those of at least some of the clients.

<sup>211</sup> See *infra* text accompanying note 282.

<sup>212</sup> See Silver & Baker, *supra* note 205, at 760.

wrap up the litigation (as Silver and Baker predict at another point),<sup>213</sup> the holdouts' efforts will probably come to nothing. By withdrawing from the group, small claimants will lose the economies of scale, case-queuing benefits, and leverage advantages that the combined litigation provides them. Unless the fund is limited and Rule 23(b)(1)(B) can properly be invoked, the settling parties can simply call the holdouts' bluff.

Applied to class action cases as a particular subset of group litigation, a situation that approximates the legal status quo, Silver and Baker's approach is similarly deficient. Large claimants should be able to hold out for full compensation, and the defendant that values global peace should have to pay for the privilege. Strategic behavior works only when the fund is limited. None of the supposed advantages of a non-unanimity rule outweigh the value of individual consent. Moreover, consent principles receive even less respect under current class action procedures than under the Silver and Baker proposal for non-class group cases. At least the group members would have to agree individually to the disclosure and voting arrangements before they bring suit, and they would possess whatever voting power the arrangement gives them. Class action procedures lack both these protections for the autonomy of the class member.

A number of authorities have argued that due process requires courts to provide a right to opt out, or at least a right to participate individually, in a class action lawsuit that will have preclusive effects on the class members.<sup>214</sup> Although current due process doctrine would need major reconstruction in order to support a second, post-certification right to opt out of a proposed settlement,<sup>215</sup> many of the same values that stand behind due process rights support individual choice regarding settlement. Important ideas behind procedural due process in the litigation context are the individual's property right in a claim for relief,<sup>216</sup> and

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<sup>213</sup> See *id.* at 767.

<sup>214</sup> The law already provides such a right in Rule 23(b)(3) class actions. I have made this argument, with qualifications, with regard to subdivision (b)(2), but not subdivision (b)(1) actions. See Weber, *supra* note 27. Authorities who have argued for a due process right to opt out of all class actions include: Maximilian A. Grant, *The Right Not to Sue: A First Amendment Rationale for Opting Out of Mandatory Class Actions*, 63 U. CHI. L. REV. 239, 247–51 (1996) (arguing that mandatory participation in class action litigation violates freedom of expression and association under the First Amendment); Stephen J. Safranek, *Do Class Action Plaintiffs Lose Their Constitutional Rights?*, 1996 WIS. L. REV. 263, 284–85; Patricia Anne Solomon, Note, *Are Mandatory Class Actions Unconstitutional?*, 72 NOTRE DAME L. REV. 1627, 1644 (1997). Professor Wooley, as noted below, has argued for a due process right of all class members to participate in all subdivision (b) class actions. See Wooley, *supra* note 21 at 611–15; see also *infra* text accompanying notes 304–09 (discussing Wooley's thesis).

<sup>215</sup> Professor Wooley does make such an argument with regard to the right to opt in and present one's own case in the class action after rejecting the class settlement. See Wooley, *supra* note 21, at 610–19.

<sup>216</sup> This idea emerged as early as *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), which concerned the right to notice of a mass proceeding for settlement of

the right to control the presentation of the claim to the court.<sup>217</sup> Settlement is a deprivation of the property right that the class member's claim represents. A court cannot compel a party to accept a settlement,<sup>218</sup> nor preclude others' claims in the course of accepting someone else's settlement.<sup>219</sup> The sole exception to this rule is, of course, the class action.<sup>220</sup> Compelling class members to accept the class settlement, however, deprives them of the individual right to make their own decision on the justice of the arrangement.

My proposal to afford class members the individual ability to accept or reject settlement is hardly without precedent, for it would partially restore the pre-1966 "spurious class action," in which the representative was able to litigate the case to judgment, binding only the representative and the defendant.<sup>221</sup> Class members

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accounts in a mutual investment scheme. *Mullane* was crucial to the cases developing due process doctrine in the 1970s, such as *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971) (upholding due process right to waiver of filing fee in impoverished person's divorce suit) and *Goldberg v. Kelly*, 397 U.S. 254, 261-63 (1970) (finding due process right to hearing on claim for continuing welfare benefits).

<sup>217</sup> See *Peralta v. Heights Med. Ctr. Inc.*, 485 U.S. 80, 85-87 (1988) (finding due process right to have judgment set aside when process had not been served, even though litigant did not claim to have meritorious defense). As the *Peralta* Court stressed, quoting the old case of *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915), "Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, 'it is no answer to say that in his particular case due process of law would have led to the same result . . .'" *Peralta*, 485 U.S. at 86-87; see also *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434-37 (1982) (finding violations of due process and equal protection in dismissal of plaintiff's employment discrimination claim because agency failed to process it in time); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958) (forbidding loss of suit on basis of discovery noncompliance that litigant had no control over); *Carrington & Apanovitch*, *supra* note 20, at 472 ("The right to individual control and management of one's own personal injury claim is itself a substantive right, indeed perhaps a constitutional right.").

<sup>218</sup> See *In re LaMarre*, 494 F.2d 753, 756 (6th Cir. 1974) (finding due process protection for right to reject settlement).

<sup>219</sup> See *Martin v. Wilks*, 490 U.S. 755, 763-69 (1989) (relying on implications of Federal Rules of Civil Procedure).

<sup>220</sup> See *Wooley*, *supra* note 21, at 591-92 (criticizing existing doctrine).

<sup>221</sup> The term appears to have been coined by Thomas Atkins Street during the era of the Federal Equity Rules, and referred originally to class actions not involving specific funds or property in which class members held joint interests. See THOMAS ATKINS STREET, *FEDERAL EQUITY PRACTICE* § 548, at 342-43 (1909). Street gave the example of defendant class actions against the members of a striking union. See *id.* at 345 ("This is the 'spurious class action' suit, the suit brought by or against numerous parties in respect of a personal liability."). The term "spurious class action" was later used in James William Moore's commentary on Rule 23 of the Federal Rules of 1938. See James Wm. Moore, *Federal Rules of Civil Procedure: Some Problems Raised by the Preliminary Draft*, 25 GEO. L.J. 551, 574-75 (1937) (illustrating the spurious class with the example of injured property owners who "bring an action on behalf of themselves and all others similarly situated," against a railroad that negligently caused a fire). Examples of cases in which class actions were litigated to judgment, binding only the

were then permitted to opt in for a share of the relief.<sup>222</sup> The 1966 Civil Rules Advisory Committee abolished the spurious class action, adding a provision to Rule 23 that the judgment in a class action, “whether or not favorable to the class, shall include” the members of the class, which meant that the judgment would act as *res judicata* for class members’ claims.<sup>223</sup> As I have detailed elsewhere, the Committee did so because of misguided ideas that fairness required mutuality of risk of preclusion. It felt that judgments should bind only when both sides of the action face mutual preclusion from the action’s result.<sup>224</sup> The Committee failed to anticipate the important development, barely more than a decade later, of offensive, non-mutual collateral estoppel.<sup>225</sup> It also ignored the withering effect on the importance of mutuality of the decades-old doctrine of non-mutual defensive preclusion.<sup>226</sup> Although the proposal made in this Article will not eliminate the preclusive effect on the class of subdivision (b)(3) class actions litigated to judgment—the 1966 revision’s notice, intervention, and opt-out rights make mutuality of preclusion constitutionally acceptable and probably politically unassailable—it will allow individual class members to escape the preclusive

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representatives, are *Fox v. Glickman Corp.*, 355 F.2d 161, 163 (2d Cir. 1965) (holding “that a judgment in such a suit does not bind members of the class who have not become parties”), and *Schatte v. International Alliance of Theatrical Stage Emps.*, 183 F.2d 685, 687 (9th Cir. 1950) (“The general rule in class suits is that the member of the class who is the original plaintiff retains control over the action as opposed to other[s] . . . who may later intervene.”). The history is recounted and sources are collected in Weber, *supra* note 27, at 395–400; see also YEAZELL, *supra* note 26, at 230–32 (providing history and analysis).

<sup>222</sup> See, e.g., *Union Carbide and Carbon Co. v. Nisley*, 300 F.2d 561, 588–89 (10th Cir. 1962); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev’d on other grounds*, 326 U.S. 99 (1945); *Foster v. City of Detroit*, 254 F. Supp. 655, 669 (E.D. Mich. 1966), *aff’d*, 405 F.2d 138 (6th Cir. 1968).

<sup>223</sup> FED. R. CIV. P. 23(c)(3); see FED. R. CIV. P. 23 advisory committee’s note (1966) (“Under proposed subdivision (c)(3), one-way intervention is excluded; the action will have been early determined to be a class or non-class action, and in the former case the judgment, whether or not favorable, will include the class . . .”).

<sup>224</sup> See Weber, *supra* note 27, at 372–73, 400, 404 (collecting sources on the advisory committee’s proposal).

<sup>225</sup> See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331–32 (1979) (applying offensive collateral estoppel in stockholders’ class action over securities fraud after prior adjudication against defendants in suit by government); see also RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982) (codifying *Parklane* approach). See generally Weber, *supra* note 27, at 404–05 (discussing collapse of mutuality objection to class actions that bind only the named parties and the defendants in light of subsequent developments).

<sup>226</sup> See *Bernhard v. Bank of America*, 112 P.2d 892, 895 (Cal. 1942) (applying a looser standard of mutuality); see also *Blonder-Tongue Labs., Inc. v. University of Ill. Found.*, 402 U.S. 313, 349–50 (1971) (applying non-mutual preclusion). Jeremy Bentham had proposed adopting a rule of non-mutual preclusion a century before the *Bernhard* case. See 7 Jeremy Bentham, *Rationale of Judicial Evidence*, in THE WORKS OF JEREMY BENTHAM 171 (John Bowring ed., Russell & Russell, Inc. 1962) (1843). See generally Weber, *supra* note 27, at 404 (discussing non-mutual defensive preclusion).

effects of settlements that they do not accept. The result will restore one important component of freedom of choice that existed in the federal system from 1938 to 1966.

A critic might argue that the choice of the class member to accept the settlement or to opt out should not be given the gravity it is assigned here because the choice itself is not a fair one: the class member lacks other choices or is a single individual confronting a powerful corporate defendant, so there is no room to bargain and the choice is illusory. This view, however, is fallacious. The take-it-or-leave-it character of an offer does not render the offer unfair. As many observers have noted, the local supermarket does not engage in bargaining with consumers over the price of a loaf of bread, but that is no reason to void the purchase.<sup>227</sup> A uniform set of terms offered to all members of a group not only reduces the transaction costs that individual bargains would create,<sup>228</sup> but also generates consumer surplus by forcing the offeror to make the terms attractive enough to generate an optimal number of acceptances, even when some of those making up the number would have settled for less.<sup>229</sup> Of course, the defendant is in the position of a monopolist (more accurately, a monopsonist, for it is buying the class member's claim rather than selling the person compensation),<sup>230</sup> but to an important extent, so is the individual, for no one is competing with the class member for the sale of the claim.<sup>231</sup>

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<sup>227</sup> See, e.g., John Dalzell, *Duress by Economic Pressure*, 20 N.C. L. REV. 237, 239 (1942) ("I agree to pay ten cents for a loaf of bread, not because I want to give the baker ten cents, but because that's the only way I can get the bread."); see also ROGER FISHER ET AL., *GETTING TO YES* 141-42 (2d ed. 1991) (discussing appropriate use of take-it-or-leave-it offers).

<sup>228</sup> See M.J. Trebilcock, *The Doctrine of Inequality of Bargaining Power*, 26 U. TORONTO L.J. 359, 364 (1976) ("If an agreement had to be negotiated and drafted from scratch every time a relatively standard transaction was entered into, the costs of transacting for all parties involved would escalate dramatically.").

<sup>229</sup> See C.E. FERGUSON & S. CHARLES MAURICE, *ECONOMIC ANALYSIS* 129 (rev. ed. 1974) (defining consumer's surplus as the area below a demand curve and above the market price). Actually, the surplus here might more properly be termed "producer surplus," for the claimant is selling the claim to the defendant, but the class of plaintiffs will realize a surplus because the defendant is the one that must make a uniform offer to a large group in order to maximize its utility in the market for preclusion. Cf. *id.* at n.9 (discussing producer's surplus).

<sup>230</sup> In a given market, a monopolist, or single seller, or a monopsonist, or single buyer, will be able to exact a better bargain than would a seller or buyer who must compete against others. See *id.* at 280-81 (describing monopoly), 369-70 (describing monopsony).

<sup>231</sup> This point needs the "to an important extent" qualification, because if the individual claims are small enough or the holdouts few enough, the scattered resistance may not make any difference to the defendant, and so the class members will be competing against themselves to be among the sufficiently large fraction of the group that will be adequate to satisfy the defendant's need for not-quite-global peace. Nevertheless, in a small-claims class, the threat to make a new class out of the holdouts may restore a semi-monopolistic balance, and the holdouts in larger-claim mass tort actions will be no worse off bargaining against the defendant than they would have been had no class action ever been brought. On the other hand, when the

As this analysis suggests, an agreement to settle a lawsuit is simply a contract. One item of value—the ongoing claim of the class member to judicial relief—is traded for another—cash, coupons, or a promise by the defendant to change its behavior. Freely chosen settlements thus confer the benefit of increasing the well-being of those who accept them and cause social benefit by directing resources towards their most valuable use.<sup>232</sup> But this advantage applies only when the contracting parties make their own choices, not when a court or self-appointed representative makes the choices for them.

### *B. Prerequisites of Meaningful Consent*

Consent, of course, is not consent at all unless the person making the decision knows to what he or she is agreeing. For that to happen, the class member must receive adequate notice of the settlement and have adequate time to reflect on the decision to accept or reject the settlement. Notice of the decision entails an adequate description of the settlement and its effects so that the person can make a choice that will maximize individual well-being. Courts have frequently declared that notice is a critical component of due process when courts or other government powers make individualized decisions affecting liberty or property interests.<sup>233</sup> Moreover, they have stressed that effective notice requires more strenuous measures than a mere gesture at informing individuals about the pendency of court proceedings.<sup>234</sup>

In the ordinary situation of an attorney negotiating a settlement for a client, the attorney is obliged to provide the client with the factual information relevant to the matter, to inform the client of what the opposing party has communicated, and to take other reasonable steps to permit the client to make a sensible decision to accept or reject any offer of settlement.<sup>235</sup> The information needed for the

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defendant needs, for reasons of its own, to have a complete settlement of all claims, individuals may be able to exploit their position to a considerable degree by threatening to upset the entire settlement by holding out. This problem will be most acute in limited fund or other true (b)(1) suits, which is why those cases are dealt with separately in my proposal.

<sup>232</sup> See ANTHONY T. KRONMAN & RICHARD A. POSNER, *THE ECONOMICS OF CONTRACT LAW* 1–2 (1979) (“By making both [persons agreeing to an exchange] better off, the exchange will also increase the wealth of the society (of which they are members) . . . .”); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 817 (1941) (“[T]he social utility of the contract is guaranteed in some degree by the fact that it emerges as a compromise of . . . competing interests.”).

<sup>233</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 267–68 (1970); see also *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 84 (1988) (“Failure to give notice violates ‘the most rudimentary demands of due process of law.’” (quoting *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965))).

<sup>234</sup> See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950) (“But when notice is a person’s due, process which is a mere gesture is not due process.”).

<sup>235</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 cmt. 1 (1983) (“A lawyer who receives from opposing counsel an offer of settlement . . . should promptly inform the

decision may include jury awards in comparable cases, as well as other matters affecting any damages awarded at trial, such as the chances of winning or losing if the claim were to go to trial, any potential problems with insolvent defendants if collection is delayed, and the impact of potential tax and subrogation liabilities.<sup>236</sup> Frequently, the lawyer must obtain information through discovery or other means to discharge the responsibility to give the client the facts on which to make a sensible decision whether to settle.<sup>237</sup>

The reality that members of a class will not be making an affirmative statement of agreement to the settlement, but simply failing to return a slip of paper asking about exclusion, should increase the attention paid to the form and content of the notice.<sup>238</sup> In ordinary circumstances an individual's silence or other failure to act does not amount to acceptance of a settlement or other contract.<sup>239</sup>

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client of its substance . . ."); see also *id.* Rule 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."). The Preamble to the Model Rules states: "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." *Id.* at pmbl. para. 2. Various authorities have discussed the civil liability of a lawyer who fails to provide adequate information to a client to permit the client to make a wise decision about a course of legal action. See Susan R. Martyn, *Informed Consent in the Practice of Law*, 48 GEO. WASH. L. REV. 307 (1980); Cornelius J. Peck, *A New Tort Liability for Lack of Informed Consent in Legal Matters*, 44 LA. L. REV. 1289 (1984); see also Amy Owen, Commentary, *May a Lawyer Agree with the Client That the Lawyer Must Approve All Settlements?*, 17 J. LEGAL PROF. 311, 314 (1992) ("[M]ost importantly, a client needs particular information concerning settlement so that he can make an informed decision. Since there is a duty to inform the client in certain situations, the failure to do so may subject the lawyer to criticism, discipline, and malpractice liability.").

<sup>236</sup> See Peck, *supra* note 235, at 1298.

<sup>237</sup> See, e.g., *Grayson v. Wofsey*, 646 A.2d 195, 197 (Conn. 1994) (malpractice liability for failure to use diligence to discover information about marital property in divorce action); *Malfabon v. Garcia*, 898 P.2d 107 (Nev. 1995) (malpractice action over settlement of accident case). These cases are discussed in Hazard, *supra* note 198, at 1263 n.25. Other relevant cases include: *Ishmael v. Millington*, 50 Cal. Rptr. 592 (Ct. App. 1966) (negligent failure to determine value of marital property); *Fishman v. Brooks*, 487 N.E.2d 1377 (Mass. 1986) (liability for failure to make adequate case preparation before settlement); *Collins v. Perrine*, 778 P.2d 912 (N.M. App. 1989) (same). But see *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346 (Pa. 1991) (barring malpractice claim for inadequate preparation when client agreed to settlement). See generally Kristine Heim Marino, *Recent Decision, The "Lawyer's Holiday:" For Victims of Legal Malpractice, Justice Goes on Vacation*, 65 TEMP. L. REV. 771, 771-85 (1992) (discussing *Muhammad* case and contrary authority).

<sup>238</sup> See Marcus, *supra* note 21, at 889 (asking "whether people who may be relinquishing the right to go to court to recover damages for life-threatening personal injuries understand what they are doing").

<sup>239</sup> See 1 JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 3.18, at 402 (rev. ed. 1993) ("It is certain that, if the only facts are that A makes an offer to B and B remains silent, there is no contract.").



Greater efforts to call the details of the settlement to a person's attention ought to apply when the rules lower the standard for what the class member needs to do to accept the deal.

Notice entails identifying everyone who ought to receive the notice, and this is where the *Amchem* class falls down. As the Supreme Court recognized, many members of the class were incapable of identification because they would enter it only by becoming spouses or dependents of the other class members in the future.<sup>240</sup> Even those persons who could be identified as having been exposed to asbestos in the past, or likely to have been, were in no position to appreciate the gravity of the settlement decision when they had not yet manifested any kind of symptoms from the exposure.<sup>241</sup> Effectively, consortium claims of individuals who cannot now be identified have to be placed beyond the reach of settlement.<sup>242</sup> If preclusion of these claims in the absence of litigation is necessary for some other social goal, Congress will need to impose it.<sup>243</sup> And symptom-free, exposure-only occupational plaintiffs are highly unlikely to be capable of adequate notification.

On the other hand, individuals with symptoms are at the stage where, in this litigious society, they certainly will have thought of legal redress. A carefully designed notice could provide fair process to them, even if they have not yet filed lawsuits of their own.<sup>244</sup> Finding those individuals requires the same steps that the district court used in *Amchem*. The Supreme Court had no serious quarrel with the notice program with respect to that group.

The content and form of the notice matter as much as the identification of the

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<sup>240</sup> See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997); see also *supra* text accompanying notes 113–15 (discussing Supreme Court's comments regarding notice).

<sup>241</sup> See sources cited *supra* note 240.

<sup>242</sup> Although the inquiry is beyond the scope of this Article, the question also exists whether obtaining a litigated result would comport with due process to a group that is physically incapable of learning of the effects of the litigation on their interests. See generally Elizabeth R. Kaczynski, Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 COLUM. L. REV. 397, 401–18 (1985) (criticizing class definitions that include persons whose causes of action will arise in the future). In any instance, a settlement of those individuals' claims violates essential ideas of consent.

<sup>243</sup> Numerous authorities have proposed legislative solutions to the problem of asbestos and other mass tort litigation, and in *Amchem*, the Supreme Court joined the chorus. See *Amchem*, 117 S. Ct. at 2238; Nagareda, *supra* note 18; Nagareda, *supra* note 133; Weinstein, *supra* note 18, at 565; see also UNITED STATES JUDICIAL CONFERENCE, REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 33–34 (1991) (cited in *Amchem*, 117 S. Ct. at 2238).

<sup>244</sup> Professor Hensler's research suggests that publicity in mass tort cases, including individualized notice, leads to two to three times greater use of the legal system than occurs among victims of other, possibly compensable product injuries. See Hensler, *supra* note 149, at 1599 ("[P]ublicizing the possible link between product use and injuries and the availability of legal remedies—whether through mass media coverage, lawyer advertising, or court-ordered notices—results in a large increase in the number of claims that are filed.").

class. Although an economically rational class member might invest money or time in seeking out the information, in small-claim classes the disparity between the cost of doing so and the value of the individual claim is such that the class member is unlikely to make the effort.<sup>245</sup> Even in larger-claim mass torts, where the amount of the recovery may justify considerable expenditures on information, there is no good reason to have each class member or that individual's attorney invest in efforts duplicative of those made by others. Careful attention on the part of the class representative and the court to the wording and design of the notice spreads the cost of a single effort over the entire class (and, because the judge is involved, the taxpaying public). Information about prior settlements (if known) or trial results in individual litigation of similar tort cases will be crucial data and ought to be included in the notice. Of course, the individual will need to invest the money to determine whether, because of the facts of that person's particular claim, the settlement offer is an advantageous one.

The transmittal of information is a basic obligation of a lawyer to a client,<sup>246</sup> and lawyers are charged with even higher than usual information disclosure responsibilities when there are potential conflicts of interest among multiple clients they represent. The Model Rules prohibit lawyers from representing clients whose interests are adverse unless the lawyer reasonably believes that the representation of one will not affect that of the other, and each client consents after consultation.<sup>247</sup> The Official Comment emphasizes the importance of the information disclosure, providing that if one client refuses to consent to disclosure needed to permit the other to make an informed decision about representation, the lawyer cannot even ask the uninformed client to consent to representation.<sup>248</sup>

The information that should go to the individual class members at the time of acceptance or rejection of the settlement is similar to the information that the parties would be presenting to the judge in fairness hearings typically held pursuant to Rule 23(e).<sup>249</sup> The point is to get this information to the class members for them to use to decide to opt out or stay in, not to hold on to the information until the fairness hearing. It is too late then: the information never gets to the people who should be making individual decisions based on it.

Attorneys' fees information should also be included in the notice, for fee

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<sup>245</sup> Cf. Elliott J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053, 2121 (1995) (discussing the economic benefits of securities action class members' investments in monitoring the class representatives and their attorneys).

<sup>246</sup> See Gary A. Munneke & Theresa E. Loscalzo, *The Lawyer's Duty to Keep Clients Informed*, 9 PACE L. REV. 391, 391 (1989) (describing attorneys as "in the business of providing information to their clients.").

<sup>247</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7(a) (1983).

<sup>248</sup> See *Id.* at cmt. 5.

<sup>249</sup> See MANUAL FOR COMPLEX LITIGATION 3D § 30.41 (1995) (discussing information relevant to fairness hearings).

arrangements would surely matter to an individual plaintiff contemplating settlement of an individual suit. The fees information ought to be understandable, just as it must be in an ordinary agreement between client and lawyer.<sup>250</sup> When self-interest in fee arrangements may affect a lawyer's professional judgment, the lawyer faces professional discipline for failing to provide full disclosure to the clients.<sup>251</sup> This condition necessarily applies when class counsel is being paid out of the settlement proceeds or in a separate payment from the defendant.

Fee information was the missing, crucial ingredient in the notice of opt-out rights and settlement in the *Hoffman v. BancBoston*<sup>252</sup> litigation in Alabama. The case was a class action concerning overcharges against escrow accounts. Much to their chagrin, class members who failed to opt out of the case found that under the settlement their escrow accounts were billed attorneys' fees nine or more times the amount of monetary relief they received.<sup>253</sup> Apparently, the court awarded a contingency fee that was calculated as a fraction of the total returnable amounts held in escrow rather than the increments in the amounts actually caused by the settlement.<sup>254</sup> Of course, had the class members been informed that they would lose more in attorneys' fees than they would gain in money damages, they would have opted out,<sup>255</sup> and even those few who would not have paid attention to an adequate notice would have been protected by the court's likely reaction to massive refusals of the settlement.<sup>256</sup>

Many authorities have questioned the effectiveness of class action notice,

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<sup>250</sup> The Model Rules provide that the basis of the fee has to be communicated to the client at or near the beginning of the representation. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5(b) (1983). Contingent fee agreements have to be in writing and give specific information about how fees are determined and expenses calculated, and they must directly state the percentage of the recovery that the lawyer will receive in the event of settlement. See *id.* at Rule 1.5(c).

<sup>251</sup> See *People v. Schmad*, 793 P.2d 1162, 1163 (Colo. 1990) (suspending attorney for, among other things, failing to disclose to the client a possible conflict of interest on the part of the attorney regarding the amount and payment method for a structured settlement).

<sup>252</sup> The case is unreported. For a description, see *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506, 508–09 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1569 (1997).

<sup>253</sup> See *id.*

<sup>254</sup> See Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1063–68 (1996) (describing settlement).

<sup>255</sup> The class members were really unwitting members of a Rule 23(b)(3)-type defendant class. Had they known what was going on, they would have acted to avoid liability by dropping out. It is precisely the anticipation of this dynamic that has rendered the defendant class device generally ineffective. See Willging et al., *supra* note 1, at 120 (finding only one certified defendant class action in study of 152 class actions in four federal judicial districts).

<sup>256</sup> The Koniak and Cohen article describes potential common law and statutory remedies against the attorneys for their conduct in the case and criticizes the Seventh Circuit's rejection of liability in follow-up litigation. See Koniak & Cohen, *supra* note 254, at 1102–1269 (discussing bases of liability), 1270–80 (discussing *Kamilewicz*).

frequently citing the silly responses that some individuals make when they receive the forms.<sup>257</sup> A crucial part of the problem is that the notices are drafted in legalese, so it is no mystery that many recipients misunderstand them. The problem can be solved by better, more sensitive drafting.<sup>258</sup> The other possible cause of the problem is that some recipients of the notice simply cannot be bothered to take the time to understand the form or take it to someone who can. Although this point may be correct for small-claims cases,<sup>259</sup> it is very dubious for larger-scale mass torts cases. Many of those individuals will already have their own attorneys, if they have sufficient likelihood of exposure and injury to appear on the list to be notified of the case. If they do not, the notice should urge them to consult a lawyer, and that person will be able to give a disinterested evaluation of the case, perhaps consulting modern, widely-used verdict reporter databases. Of course, if enough individuals reject the settlement, the deal is likely no longer to be attractive to the defendant and will need to be renegotiated. Even if the defendant wants to maintain the agreement and deal with the opt outs separately, a high number of opt outs may be grounds for the court to conclude that the settlement is insufficient or to doubt representative adequacy.

### *C. The Difficulties with Relying on Implied Consent*

One might argue that consent may safely be assumed when the stakes are small and the interests of the class members are clearly identical, as in most consumer or securities class actions. But even in that situation, the choice to settle or to litigate depends not only on the strength of the claim, but also on the taste for taking risks. The former may be uniform throughout the class, but the latter most assuredly is not. The interest in guaranteeing meaningful consent may also be weaker in some (b)(2) cases because of the uniformity of interests of class members, although the interests of the system in affording class-wide preclusion for defendants are weaker. Moreover, the smaller the claim, the less incentive any class member has to monitor the attorney.<sup>260</sup> Resistance to the settlement on the part of class members is a more effective check on attorney overreaching than court review is likely to be.

One might also argue class members who fail to opt out at the class certification stage of a class action should have no right to make a second election

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<sup>257</sup> See, e.g., Arthur Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 322 (1972).

<sup>258</sup> See DEBORAH RHODE, *CONFLICTS OF INTEREST IN EDUCATIONAL REFORM LITIGATION* 31–32 (1982) (describing potential improvements of class notice).

<sup>259</sup> If it is true, it is simply an illustration of the point that the recipient's time is more valuably spent doing something other than deciphering the notice. If that in turn is true, then the court system need not preoccupy itself with heroic efforts to maximize that person's recovery. The person has been afforded the choice and has chosen to do nothing.

<sup>260</sup> See Weiss & Beckerman, *supra* note 245, at 2064–65.

to accept or reject the settlement that the class representative arrives at. There are two responses to this position. First, of course, not all class actions afford notice and an opportunity to opt out at the certification stage: only subdivision (b)(3) cases that are not brought as settlement class actions afford these rights.<sup>261</sup> Choice of whether or not to settle is equally important in cases that will have preclusive effect but are primarily for equitable relief and thus fall under subdivision (b)(2).<sup>262</sup> Unless the equitable relief consists of conduct that must be identical with regard to all members of the class in order to be legally permissible,<sup>263</sup> the class members' personal freedom and preferences for risk should be accommodated in non-cash cases just as they ought to be in cases brought for a money judgment.<sup>264</sup>

Second, it is incorrect to assume that the willingness to accept representation by the class representative and her attorney constitutes willingness to settle on whatever terms they arrange. Current class action law recognizes this fact by providing for a settlement fairness determination by the district judge,<sup>265</sup> but for reasons explained above, that determination is no substitute for individual choice. Even the free choice of an attorney and the personal designation of that individual as an agent to negotiate settlement is not a delegation of the authority to settle the case. The Model Rules make the distinction perfectly clear: settlement is a decision reserved for the client, not to be decided by the attorney, no matter how competent or selfless the attorney. The client must explicitly give authority to settle.<sup>266</sup> Good reason underlies the rule. No matter how skillful the representative may be at comparing the settlement to the predicted outcome of the litigation, no human being can know another's willingness to take a risk that the outcome will be better.<sup>267</sup> Moreover, reserving the choice for the client reinforces the basic principle that the client retains human autonomy despite being assisted by a

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<sup>261</sup> See FED. R. CIV. P. 23(c)(2).

<sup>262</sup> See Weber, *supra* note 27, at 385–94.

<sup>263</sup> In such a situation, the class should be deemed a (b)(1) class, just as it should be in instances in which a holdout can obtain a larger share of a fixed pie simply by being a holdout. In these instances, individual consent need not be obtained, but the Rule 23(a) requirements should be enforced strictly. See *infra* text accompanying notes 321–29.

<sup>264</sup> See Weber, *supra* note 27, at 385–94 (contending that due process requires notice and opt-out rights in (b)(2) actions that have preclusive effects). The due process argument in favor of notice and opt-out rights at time of settlement may not be as strong as that supporting notice and opt out at some point before final disposition, for the failure to opt out in response to the class certification might be viewed as tacit consent to settlement, at least if the class member is warned of this possibility. Nevertheless, prudential considerations still counsel provision of notice and opt-out rights at time of settlement.

<sup>265</sup> See FED. R. CIV. P. 23(e).

<sup>266</sup> See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983).

<sup>267</sup> See *supra* text accompanying notes 197–202.

learned professional.<sup>268</sup>

#### D. Practical Effects of Requiring Individual Consent

The effective result of requiring individual consent for class action settlements will be clearer and more limited class definitions so as to allow for adequate notice; otherwise, settlement classes or other cases that reach compromise early in the litigation will be permissible.<sup>269</sup> Likewise, less cohesiveness in the class than what *Amchem* tolerated will be permissible. Apart from the individual consent requirement, the status quo ante *Amchem* will be restored. However, notice should be improved: class members need to get more information, and have to be urged to contact their own attorneys in all cases involving potentially significant relief, such as toxic torts. There will be added costs of a second notice in cases that settle after certification, but these costs are subject to negotiation between the named plaintiffs and the defendant.<sup>270</sup>

The attorneys for individual class members would probably opt more of them out and launch more follow-up classes than now. Costs of individual litigation and the queue for hearings place some limits on that conduct, nevertheless.<sup>271</sup> If the representative in the initial class action is later found to have conferred strategic benefits on the follow-up plaintiffs by developing facts or establishing a model settlement, that person should have a claim against the opt outs for some share of attorneys' fees.<sup>272</sup>

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<sup>268</sup> See *supra* text accompanying notes 194–96.

<sup>269</sup> Settlement, at any stage of the litigation, is not inherently suspect. "The notion that parties cannot justly settle personal injury claims is absurd, unless one takes the position that parties lack the capacity to contract concerning their own interests." Hazard, *supra* note 198, at 1259.

<sup>270</sup> The costs are not insurmountable. Multiple notices have been provided to class members in mass tort cases for a variety of reasons, including large numbers of failed responses, see Vairo, *supra* note 17, at 149 (describing Dalkon Shield litigation), and misconduct by claimants' attorneys, see *Georgine v. Amchem Prods., Inc.*, Civ. A. No. 93-0215, 1995 WL 561297, at \*4 (E.D. Pa. Sept. 18, 1995) (describing *Amchem* notice).

<sup>271</sup> See *supra* text accompanying notes 157–62.

<sup>272</sup> The possibility of shifting some of the fees or costs from the class action to the holdouts is the best way to deal with the potential free rider who opts out of a settlement but still wishes to take advantage of the extensive case development undertaken by the class representative's attorney in litigating or in bargaining for his or her own settlement. Cf. Roger Furman, Note, *Offensive Assertion of Collateral Estoppel by Persons Opting Out of a Class Action*, 31 HASTINGS L.J. 1189, 1190–91 (1980) (arguing that persons who opt out of a class should be permitted to use offensive, non-mutual collateral estoppel only when their individual interest in controlling their own litigation is so strong they would opt out regardless of their right to use collateral estoppel). Because this approach accommodates individual choice, it is infinitely better than the proposal to limit opt-out rights in order to reduce free riders. A limit on opt-out rights is proposed in Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a*

Class members who do not accept the proposed settlement may choose to file their own individual actions, or any one of them may file a follow-up class action comprising all those who rejected the settlement. The statute of limitations applicable to their claims should toll during the pendency of the first class action, in accordance with current law.<sup>273</sup> Of course, those who choose the risky course of refusing a proffered settlement will have to live with the consequences of their decisions. In the "*Agent Orange*" litigation, class members who did not accept the settlement offered by the defendant chemical companies continued to litigate their tort claims, only to see them fail on grounds of causation and the government-contractor defense.<sup>274</sup>

Beyond these specific predicted consequences, the general effects of the consent-based approach include potential problems of identifying class members to obtain consent and of erecting insurmountable obstacles to settlement, in particular, the disincentive for defendants to agree to a deal that may not include all plaintiff class members.

### 1. Identification Problems

In some class actions, it is difficult to identify the class members so as to provide them notice and ask them whether they accept the proposed settlement. Therefore, this proposal may act as an impediment to the settlement of these cases.<sup>275</sup> The proposal here, however, is meant to apply only to settled class actions and only to those in which the settlement will bind the class members. It does not entail an endorsement of those cases that have required the precise identification of all persons who fit into a class or would be entitled to relief upon adjudication. Critics have rightly questioned whether it makes any sense to deny class status in cases such as the Seventh Circuit's *Adashumas v. Negley*,<sup>276</sup> in which the plaintiff class sought injunctive relief requiring defendants to undertake efforts to find out which school age children qualified for learning disability services, as the defendants were required to do under federal statutes. The court in

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*Federal Class Action*, 100 YALE L.J. 745, 745 (1990).

<sup>273</sup> See *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1488 (9th Cir. 1985); cf. *Crown Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983) (tolling statute when class certification denied).

<sup>274</sup> See *In re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1256-64 (E.D.N.Y. 1985).

<sup>275</sup> Of course, *Amchem* itself has the same effect, by questioning whether notice sufficient to satisfy Rule 23(c)(2) can possibly be provided to persons such as future spouses and children, who have not yet come into a position where they can even be identified in theory. See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2252 (1997).

<sup>276</sup> 626 F.2d 600, 603 (7th Cir. 1980); see also *Simer v. Rios*, 661 F.2d 655, 669 (7th Cir. 1981), cert. denied, 456 U.S. 917 (1982) (rejecting certification of class of persons denied energy assistance on grounds, inter alia, that identification of class members would be costly or impossible).

that case affirmed denial of class certification, stating that locating the children entitled to relief would be difficult.<sup>277</sup> Unless a class action can be brought in a case like *Adashunas*, the legal entitlement will remain unenforceable: as soon as the class member is identified, that person's claim is mooted.<sup>278</sup>

As authorities have pointed out, the necessity for identification of class members depends on the reason for identification. If in a given case the class's interests can be protected without precise identification of class members, the effort is not necessary.<sup>279</sup> Then again, cases of this type should not be settled without the effort to identify and provide adequate notice, or if they do settle, the decree should not bind those class members who did not receive notice and the opportunity to decline the offer.<sup>280</sup> What the law ought to require is identification sufficient to allow meaningful choice by class members who are being precluded by the proposed settlement.

## 2. Obstacles to Settlement

It may be argued that the prospect of numerous opt outs along with the possibility of a second class action brought by dissident class members will sour too many settlements and make class members worse off than they were under the *Amchem* approach, which allows settlements to go forward without the difficulties of obtaining the consent of all class members. This point actually contains two objections: first, the class identification requirement implicit in the consent approach is impossible to meet; second, the identification requirement can be met, but the settlement will not be attractive to the defendant unless all identified class members are precluded by the offer. Of course, as noted above, in some cases identification of class members will be impossible, or at least so difficult as to prevent meaningful notice and opportunity for consent from being

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<sup>277</sup> See *Adashunas*, 626 F.2d at 603–04.

<sup>278</sup> The upshot of *Adashunas*, of course, is that the class members had to be identified by the named plaintiff in order to enforce a statutory entitlement to be identified by the defendant.

<sup>279</sup> Thus, the often-quoted statement in the second edition of *Moore's Federal Practice* needs to be read in its entirety: "[T]he membership of the class must be capable of ascertainment under some objective standard so that the court may insure that the interests of the class are adequately represented." 3B JAMES WM. MOORE, *MOORE'S FEDERAL PRACTICE* para. 23.04[1], at 104–05 (2d ed. 1987) (emphasis added). If, under the court's disposition of the case, the class members' interests are fully protected without the members being individually identified until the distribution of relief, Rule 23 is satisfied. For Rule 23(b)(2) cases, any requirement of individual identification is relaxed. See *Anderson v. Coughlin*, 119 F.R.D. 1, 3 (N.D.N.Y. 1988) (stating that under Rule 23(b)(2), "precise definition is not as important as it may be under other class certification rules").

<sup>280</sup> As I have argued elsewhere, the same thing ought to be true for adjudications of class actions that have binding effects, even in cases brought under Rule 23(b)(2). See Weber, *supra* note 27, at 385–94.



afforded.<sup>281</sup> Those cases, however, will still be able to settle with regard to known class members' claims. For the other class members, settlements are too threatening to individual interests to be permitted to occur without consent; the settlement will simply have to wait until the class members can be identified and agree to the deal. Adjudication (or legislation) will be the only way to obtain preclusive effect over claims of persons who cannot be identified. Effectively, the proposal being advanced here gives plaintiffs the benefits of using class action procedure in avoiding delay in recovery for those who accept the settlement. It also gets those claimants' cases out of the way, diminishing the trial queue for those who do not accept the settlement.

This conclusion leads to the second objection, that having too many (or even a few) of the class members' claims unsettled will make the prospect of settlement unattractive to defendants or cause them to offer less than what they would offer if the settlement gave them global peace. One response to this argument is that the problem is hardly worse than what *Amchem* permits. *Amchem* was a settlement class action. It afforded the right to opt out of the settlement to all class members whose identities could be obtained. The *Amchem* Court did nothing to weaken this opt-out right. The *Amchem* approach does not ensure global peace any more than the instant proposal does.

A second, more fundamental, response to the objection is that global peace is greatly overrated even in cases unlike *Amchem*, in which the opt-out rights are given at the time of class certification, rather than at the time of settlement, or in which there are no opt-out rights because the case is one for equitable relief. For class actions composed of small-damages claims, individual plaintiffs who do not opt for the settlement will not recover more than the cost of litigation, and so are unlikely to sue on their own. If a dissident class action does obtain more in settlement for its members than the original action did, that result is proof that the first offer was not good enough.

Mass products or mass disaster actions composed of larger claims are worth bringing on an individual basis, so the decision to opt out and bring an individual suit is a more realistic one. It is doubtful, however, whether this fact will keep defendants from settling, or keep class representatives from bringing cases because they will anticipate that defendants will not settle. Every large defendant, and every defendant's insurance company, considers a certain level of individual personal injury suits to be a cost of doing business. The fact that the *Amchem* defendants supported the settlement through an appeal to the Supreme Court despite 87,000 opt outs demonstrates that not-fully-comprehensive settlements remain attractive to defendants.<sup>282</sup>

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<sup>281</sup> See *supra* text accompanying notes 275–80.

<sup>282</sup> But see Vairo, *supra* note 17, at 127 (“[D]efendants particularly want global peace as a consequence of settling a mass tort.”). Of course, defendants benefit from complete preclusion of all claims, but that does not contradict the fact that they offer attractive settlements without a guarantee of it. See Rheingold, *supra* note 204, at 405 (“[I]f a small enough opt-out number is

What defendants fear most is the "bet the company" or "bet the industry" case, and some authorities argue that they have too great an incentive to settle dubious claims when class actions amass claims to create such a situation.<sup>283</sup> But the instant proposal makes "bet the company" cases no easier (though not much more difficult) than they are under *Amchem* and the rest of existing class action law. Class action plaintiffs' representatives will be as free as before to assemble large-damages injury suits into mass tort actions, and defendants will have the same freedom to make an offer of settlement in order to escape the squeeze created by the cumulative weight of the claims. The instant proposal is far more hospitable to early settlement of mass tort cases than the approach of some circuit courts, which would bar any class treatment of a tort that is not "mature" enough to establish a history of valuation of cases.<sup>284</sup> Under the proposal I advance, early settlement is perfectly permissible among defendants and those class members who prefer not to speculate on the change in the value of the claim as facts are developed and other cases elsewhere go to judgment.<sup>285</sup> It is the parties' choice.

One way in which the proposal might be more beneficial to the interests of defendants than the status quo is that it may give defendants the opportunity to reserve the right to oppose class treatment should the settlement not be accepted by a sufficient number of class members to meet the defendants' needs for protection from further litigation. This feature follows from the allowance for an early decision by class members whether to participate in the settlement. As noted above, defendants are most concerned about the risks of loss of the company in a class action that goes to trial.<sup>286</sup> The current Rule's emphasis on early determination of class status,<sup>287</sup> with notice,<sup>288</sup> and without any determination on

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established—for example, no more than 5% of the cases—many defendants will agree [to a settlement] as an expedient solution.”).

<sup>283</sup> See, e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir.) (granting writ of mandamus to overturn class action certification in blood-products case, stating that use of class action procedure may create irresistible pressure for settlement in some cases), *cert. denied*, 516 U.S. 867 (1995).

<sup>284</sup> See *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

<sup>285</sup> Professor Mullenix contends that parties are unlikely to settle a mass tort class action unless the tort is mature enough to have the basis for clear valuations. See Mullenix, *Constitutionality*, *supra* note 19, at 632–33. In the main that may be correct, but there are sufficient counter examples (the *Silicone Gel* case, for one) to consider the possibility that cases may settle earlier. If consent is obtained, that possibility should not cause concern.

<sup>286</sup> See Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 603 (1997) (“Defendants . . . would be extremely reluctant to agree to a trial class even in conjunction with a settlement class for fear that the settlement class might fail, leaving them in the untenable position of facing a trial class.”); see also *supra* text accompanying note 283 (discussing the “bet the company” class action case).

<sup>287</sup> See FED. R. CIV. P. 23(c)(1) (“As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so

the merits,<sup>289</sup> clears the way for trial class actions without doing much either to aid or to deter settlement classes. The proposal advanced here would permit plaintiffs and defendants to work out a tentative class settlement, and, if sufficient consent is garnered, to go ahead to settlement with those who consent, without making any determination about the propriety of class treatment for the remainder.

The consent approach does enhance the likelihood of having larger numbers of individual actions left over after the bulk of the case settles, but that risk hardly seems unfair to defendants. In fact, the dynamics of court delay and congestion may confer significant strategic advantages on defendants in confronting individual cases under those circumstances.<sup>290</sup> In any instance, the defendants will always be able to obtain global peace, at a price, by taking the litigation through to judgment or by sweetening the offer enough so that there are no dissident plaintiff class members.

## VI. THE FLAWS OF ALTERNATIVE APPROACHES

Some alternative proposals to protect absent class members in the settlement process rely either on the district courts or intervening class members. Still another proposal would auction the class action to a lawyer or other individual, distribute the proceeds to the class members, and permit the buyer to pursue the case for maximum individual benefit. These approaches, however, do not achieve the same benefits as a consent-based approach to settlement.

### A. Greater Judicial Scrutiny of Settlements

An approach to settlement that is different both from one based on consent and from the one endorsed by the *Amchem* Court might rely on judicial scrutiny of the settlement proposal itself. For example, the proponents of the settlement in *Amchem* urged the Court to defer to the judgment made by the district court that the settlement itself was fair and adequate, and accordingly to relax any other basis of review of the class.<sup>291</sup> The district court would scrutinize the agreement, perhaps rewriting it if it did not meet standards of fairness to all class members. Various authorities argue for standards different from those currently employed,

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maintained.”); see also *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974) (noting the Rule’s “command” that class action determination be made promptly).

<sup>288</sup> See FED. R. CIV. P. 23(c)(2) (requiring notice).

<sup>289</sup> See *Eisen*, 417 U.S. at 177 (“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”).

<sup>290</sup> See *supra* notes 157–62 and accompanying text.

<sup>291</sup> See *Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231, 2248–49 (1997) (rejecting position).

but would nevertheless count on the district judge to protect the absent class members by making a tough-minded determination of fairness of the proposed settlement, or changing the settlement terms to make the pact fair.<sup>292</sup>

Judicial scrutiny of the terms of the bargain is of limited benefit, however. The judicial function consists of evaluating evidence and legal argument to determine the correct outcome for an alleged violation of rights brought to the court for remedy.<sup>293</sup> The problem is that the "correct" terms of a class settlement are unknowable, for the acceptability of the deal will vary with each class member.<sup>294</sup> Even if the inquiry that the court makes under existing law were the one that mattered, it is hard to imagine that any rule addressed to the judge would lead to improved settlements. The only way to get enough information to be completely accurate in comparing a proposed settlement with the litigated result is to try the case. Courts already spend large amounts of time on class action cases in relation to what they spend on other matters.<sup>295</sup> The district judges certainly would not spend all that time unless they themselves believed that they were affording meaningful review of settlements. It is hardly realistic to expect better judicial scrutiny from a rule that shouts at the judges that they should do what they already think they are doing.

An instructive analogy may be drawn to situations in which individuals make an ordinary contract, either to settle a lawsuit<sup>296</sup> or for any other purpose. If the

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<sup>292</sup> See, e.g., Marcus, *supra* note 21, at 907; Resnik, *supra* note 90, at 858; Vairo, *supra* note 17, at 161–62; Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 477–500 (1996).

<sup>293</sup> See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 369 (1978).

<sup>294</sup> The same problem exists with proposals that would enhance or render more neutral the information provided to the judge, such as Professor Green's suggestion that courts appoint special masters or guardians ad litem for some class members. See Green, *supra* note 19, at 803; see also Sylvia R. Lazos, Note, *Abuse in Plaintiff Class Action Settlements: The Need for a Guardian During Pretrial Settlement Negotiations*, 84 MICH. L. REV. 308, 310–11 (1984) (advancing proposal for appointment of guardian); cf. Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements—A Case Study of the General Motors Truck "Side Saddle" Fuel Tank Litigation*, 31 LOY. L.A. L. REV. 409, 416–17 (1998) (discussing the role of objector in class action settlement proceedings but acknowledging availability of means to avoid scrutiny of settlements). The difficulty is not simply predicting what the likely outcome of the case would be if it were tried; the difficulty is substituting one individual's risk preferences for those of another.

<sup>295</sup> See Willging et al., *supra* note 1, at 96–97 ("Based on case weights derived from [the Federal Judicial Center's most recent] Time Study data, the average class action demands considerably more judge time than the average civil case. We found this when we looked at the data for all subject matter (nature-of-suit) categories combined and when we looked at the data by nature-of-suit category.").

<sup>296</sup> In *McCall-Bey v. Franzen*, 777 F.2d 1178, 1186 (7th Cir. 1985), the court noted that federal courts' ordinary remedy for the failure of one of the parties to obey a settlement that had led to dismissal of the case is simply to restore the case to the docket. Even in situations in

contract fails because of mistake, fraud, or impossibility, the court does not rewrite the contract to reflect a just or "correct" agreement. The proper remedy is rescission of the contract.<sup>297</sup> The court will reform the contract only when there has been fraud or mistake in committing the agreement to paper, and then only to reflect the actual agreement of the parties, not some optimally just or constructively correct agreement.<sup>298</sup> As a matter of general contract law, the determination of what is a fair deal is always that of the parties.<sup>299</sup> The court relies on the parties' own assessment of what constitutes adequate consideration for the contract, not some abstract sense of what the agreement ought to contain.<sup>300</sup> Similarly, even under current class action settlement law, the role of the court in evaluating the settlement is to give a simple yes or no on the settlement, not to rewrite the bargain of the parties.<sup>301</sup> The reason this approach is not sufficient is that the agreement is not "of the parties" but of the defendant and someone acting for the rest of the parties. Those individuals are entitled to make their own individual decisions whether the bargain is acceptable.

### B. *Enhanced Intervention Rights*

The ability to opt in, or to participate as an intervenor in the class action, is no substitute for ability to refuse to accept a proposed settlement. Existing law provides that Rule 23(b)(3) class members may participate in the action if they are unhappy with class representation,<sup>302</sup> but courts have limited intervention to

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which the court enforces the agreement, the court does not rewrite the agreement but enforces it as written. *See generally* Kokkonen v. Guardian Life Ins., 511 U.S. 375 (1994) (requiring independent jurisdictional basis for federal court enforcement of settlement).

<sup>297</sup> See DAN B. DOBBS, 2 LAW OF REMEDIES § 9.5, at 615 (2d ed. 1993).

<sup>298</sup> See *id.* ("If there is no agreement, or if the agreement itself is voidable for fraud, then the remedy is traditionally one of rescission, not reformation.").

<sup>299</sup> Of course, doctrines such as unconscionability, duress, or public policy might still bar enforcement of the contract, but these considerations also lead to rescission, not to substantive revision of the agreement by the court. *See, e.g., id.* § 10.1, at 634 ("The contract induced by duress or undue influence may be cancelled . . .").

<sup>300</sup> See 2 PERILLO & BENDER, *supra* note 239, § 5.14, at 63 ("That which is bargained for by the promisor and given in exchange for the promise of the other party is not prevented from being consideration by virtue of the fact that what the promisee does or promises to do does not have a market value equal to that promised by the promisor.").

<sup>301</sup> See *Evans v. Jeff D.*, 475 U.S. 717, 726–27 (1986) ("Rule 23(e) does not give the court the power . . . to modify a proposed consent decree and order its acceptance over either party's objection."); *Harris v. Pemsley*, 654 F. Supp. 1042, 1049 (E.D. Pa. 1987) ("In considering the proposed settlement, the court's role is a limited one. The court may either approve or disapprove the settlement, it may not rewrite it.").

<sup>302</sup> Rule 23(c)(2) provides that in any subdivision (b)(3) action, notice must advise class members that "any member who does not request exclusion may, if the member desires, enter an appearance through counsel."

applicants who can make a convincing showing of a likely contribution to the litigation.<sup>303</sup> Professor Wooley has argued that a class member's right to participate as an intervenor should not be so restricted and that due process demands the opportunity to have an individual status in the litigation if the class member makes a timely application.<sup>304</sup>

However, as even Professor Wooley acknowledges, trial courts seeking to keep cases from spiraling out of control have a near-irresistible urge to restrict the level of participation of intervenors and to allow the class representatives to set the litigation strategy for the entire class.<sup>305</sup> It is hard to imagine that appellate courts could effectively monitor such low visibility decisions whether discovery the intervenor proposes to conduct or evidence that an intervenor proposes to present would be duplicative of what the class representative has already done. Whatever the verbal formula employed by courts, the most likely result is that individual intervenors will be lost in the shuffle, unable to have their positions heard and appreciated.

The judges have a point behind their reluctance to allow participation by too many separate parties. The presence of too many litigants makes the mechanics of litigating the case impossible<sup>306</sup> and threatens information overload.<sup>307</sup> Moreover, in cases in which the class representatives work out a settlement with defendants, it is doubtful that an intervenor would desire to carry out the litigation before a judge who already deemed the settlement fair and adequate and who has a stake in getting the matter off the docket.<sup>308</sup> It is far better for the dissident class member to exit and file a solo action, or if the dissident class members are numerous enough, to file another class action composed of the persons dissatisfied with the agreement. Despite the rhetorical appeal of the right to participate, many tort claimants just want results.<sup>309</sup> To some people,

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<sup>303</sup> See Wooley, *supra* note 21, at 603–04 & nn.148, 152 (collecting cases).

<sup>304</sup> See *id.* at 604–10.

<sup>305</sup> See *id.* at 604; see also Richard L. Marcus, *Confronting the Consolidation Conundrum*, 1995 B.Y.U. L. REV. 879, 890–94 (describing loss of individual litigant control in consolidated cases).

<sup>306</sup> See Kevin H. Hudson, Comment, *Catch 23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problem of the Mass Tort Case*, 40 EMORY L.J. 665, 673 (1991).

<sup>307</sup> See Brunet, *supra* note 52, at 720 (“[I]ntervention . . . can greatly complicate litigation by introducing new issues.”).

<sup>308</sup> See Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 358 (1986) (describing incentives of lawyers to appease judges conducting settlement negotiations by attempting to appear reasonable to the judge); see also Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 430–31 (1982) (describing threat to impartiality when the judge has become invested in settlement arrangements or wishes to clear the docket).

<sup>309</sup> See Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92–100 (discussing study of lawyer-client relations).

participation in the process of litigation matters a great deal. To others, it matters not at all. Still others are terrified of it. Individuals should be able to choose participation or choose results, or even to trade one off for the other.

### C. *The Auction Proposal*

Another major proposal that might be viewed as an alternative to the consent-based approach is to auction the class action at the start, effectively settling the class members' claims immediately after suit is filed.<sup>310</sup> If the action is sold to a lawyer, the claims are assigned to that individual for some fraction of their face value.<sup>311</sup> If the action is sold to the defendant, the claims are settled, again for some fraction of the maximum they might bring in if litigated to judgment.<sup>312</sup> Such an approach has promise in reducing the conflict of interest between class counsel who are trying to maximize their remuneration per hour and class members who are trying to maximize recovery. It faces inevitable difficulty in civil rights<sup>313</sup> or other suits where valuation is difficult and expenses properly disproportionate to recovery<sup>314</sup> and was initially proposed by Professors Macey and Miller to be used in large-scale, small claims actions in which multiple class suits have been filed.<sup>315</sup> In small claims, non-civil rights class actions, if the individual claimant is content with an auction procedure, there should be no conflict between the approach proposed in this article and an auction.<sup>316</sup> The

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<sup>310</sup> See Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 105-16 (1991).

<sup>311</sup> See *id.* at 106-07.

<sup>312</sup> See *id.* at 107-08.

<sup>313</sup> See *id.* at 116.

<sup>314</sup> In civil rights actions, the availability of attorneys' fees for the prevailing plaintiff is a congressional recognition that vindicating the civil right is a public value and that litigants must be able to undertake expenses that they cannot expect to recover out of the monetary result in the case. See Mark C. Weber, *The Federal Civil Rules Amendments of 1993 and Complex Litigation: A Comment on Transsubstantivity and Special Rules for Large and Small Federal Cases*, 14 REV. LITIG. 113, 133-34 (1994).

<sup>315</sup> See Macey & Miller, *supra* note 310, at 105. More recently, Macey and Miller have suggested that the procedure might be adapted for use in mass tort lawsuits. See Jonathan R. Macey & Geoffrey P. Miller, *A Market Approach to Tort Reform via Rule 23*, 80 CORNELL L. REV. 909, 915-17 (1995); see also Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 982-84 (1995) (considering merits of auction idea in mass tort settings). In my view, the ability to opt out of such a settlement procedure would have even greater importance in these large-claims cases.

<sup>316</sup> Some commentators have been critical of the auction proposal. See, e.g., Weinstein, *supra* note 18, at 527-31 (criticizing depersonalization and decrease of entrepreneurship; suggesting that bidding may work as an initial screen, but citing risks of inadequate investigation and collusion if the defendant participates). For a cautious, but generally favorable review, see Randall S. Thomas & Robert G. Hansen, *Auctioning Class Action and Derivative*

individual should, however, receive notice and the opportunity to opt out of the deal (as, at one point, Macey and Miller suggest will be the case).<sup>317</sup> If these rights are not afforded, an auction procedure would defeat the values protected by a consent requirement, including the dignity of individual decision making and respect for individual risk preferences.<sup>318</sup>

## VII. LIMITS OF A CONSENT-BASED APPROACH

There are appropriate limits to the application of a consent-based approach to the settlement of class actions. The consent requirement plainly should not be applied to defeat cases like *Adashunas v. Negley*,<sup>319</sup> where the only means to end the violation of law is a subdivision (b)(2) class action on behalf of a class too amorphous to be notified to obtain consent.<sup>320</sup> However, there should not be preclusion for class members in that instance either, and there should not be any binding settlement unless the class members somehow have been identified, notified, and afforded a choice to settle or not.

Also, genuine subdivision (b)(1)(B) class actions should not fall under the consent paradigm because of problems with persons holding out for more than a proportional share of the limited fund.<sup>321</sup> In those cases, however, the only rational solution is subclassing and strict adherence to the typicality, representative adequacy, and common question tests. Courts have upheld non-opt-out class settlements when the parties have presented persuasive evidence that the defendant is or is likely to become insolvent, and so all claims must be ratably reduced.<sup>322</sup> Class actions under (b)(1)(B) do not require individualized notice or

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*Lawsuits: A Critical Analysis*, 87 NW. U. L. REV. 423 (1993).

<sup>317</sup> See Macey & Miller, *supra* note 310, at 107.

<sup>318</sup> See *supra* text accompanying notes 194–202.

<sup>319</sup> 626 F.2d 600 (7th Cir. 1980).

<sup>320</sup> See *supra* text accompanying notes 276–80 (discussing *Adashunas*).

<sup>321</sup> For an elaborate law-and-economics explanation of why fixed-pie cases are vulnerable to holdout problems, see Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85 (1997). However, the point was intuitively obvious to the first courts that used the class action device and to the 1966 drafters of Rule 23. See FED. R. CIV. P. 23 advisory committee's note (1966).

<sup>322</sup> For example, in *In re Rio Hair Naturalizer Products Liability Litigation*, No. MDL 1055, 1996 WL 780512 (E.D. Mich. Dec. 20, 1996), the court found that a manufacturer of a defective hair product was insolvent and that the only assets available to satisfy the many likely judgments against the defendant was an insurance policy. The policy limits were far below the likely cumulative liability, and so the court certified the class under Rule 23(b)(1)(B) and approved a proposed settlement providing limited recovery for all consumers who submitted claims. See *id.* at \*10–13. A similar case with somewhat less compelling evidence of the defendant's inability to satisfy all potential judgments is *Fanning v. Acromed Corp.*, 176 F.R.D. 158, 167–70 (E.D. Pa. 1997), involving claims against the manufacturer of orthopedic bone screws said to be defective. A recent decision rejecting (b)(1)(B) certification for want of



the right to opt out, even when they settle. The failure to afford these protections raises serious due process issues when, as would appear necessary, all class members' rights have to be precluded in order to make the adjudication or settlement work.<sup>323</sup> I have previously suggested that individual notice and the right to participate should be provided in similar situations under subdivision (b)(2),<sup>324</sup> and would suggest a similar solution in (b)(1)(B) cases. Given the convenience and efficiency of modern bankruptcy procedure, legitimate questions may be raised whether Rule 23(b)(1)(B) is ever appropriate for use in a mass tort case.<sup>325</sup>

In any instance, persuasive proof would need to be adduced that the fund is limited before the courts should dispense with the requirement of individual consent. A good example of a case in which the court found the existence of a limited fund without adequate evidence for that conclusion is the Fifth Circuit's *In re Asbestos Litigation*.<sup>326</sup> There the court treated the assets the company and its insurers set aside to settle the litigation as a fixed amount equivalent to a limited fund. The fund was not in fact limited: all the assets of the company, which was solvent, and its insurers, which were also solvent, were available to satisfy any judgment against it, as were all future earnings.<sup>327</sup> The court used the settlement's set aside of certain assets under the settlement as a mechanism to bootstrap limiting the liability to that amount.<sup>328</sup> Class members who felt dissatisfied with the settlement should have been permitted to reject it, as they would have been had the case properly been designated as a Rule 23(b)(3) settlement class action, or as they would have under the proposal advanced in this Article.<sup>329</sup>

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evidence of a limited fund is *Hum v. Dericks*, 162 F.R.D. 628 (D. Haw. 1995), an action based on the charge that a clinic implanted artificial ligaments of an unapproved type.

<sup>323</sup> Making this point with regard to a subdivision (b)(1)(B) class involving institutional relief at a state mental hospital is *Caroline C. v. Johnson*, 174 F.R.D. 452, 467 n.18 (D. Neb. 1996). The court indicated that subsequent claims for damages by absent class members would not be precluded. *See id.*

<sup>324</sup> *See Weber, supra* note 27, at 409–13.

<sup>325</sup> *See Issacharoff, supra* note 21, at 823–24. As Professor Marcus notes, the bankruptcy procedure is far superior because it protects the interests of creditors other than the mass tort claimants and provides standards for resolving competing claims to the assets. *See Marcus, supra* note 21, at 880–81. The Dalkon Shield case arose out of bankruptcy and involved a limited fund for compensation of the unliquidated tort claims, made available by the buyer of A.H. Robins' assets. *See In re A.H. Robins*, 880 F.2d 709, 720–21 (4th Cir. 1989).

<sup>326</sup> 90 F.3d 963, 982–86 (5th Cir. 1996), *vacated*, 117 S. Ct. 2503 (1997), *reaff'd*, 134 F.3d 668, 669 (5th Cir. 1998), *cert. granted sub nom. Ortiz v. Fibreboard Corp.*, 118 S. Ct. 2339 (1998).

<sup>327</sup> *See* 134 F.3d at 671–72 (Smith, J., dissenting). There were disputes over coverage as well as underlying liability.

<sup>328</sup> *See id.*

<sup>329</sup> As noted above, the proposal in this Article would impose safeguards of disclosure beyond those currently required in Rule 23(b)(3) settlement classes, working an improvement

Finally, even a consent-based approach to class action settlement may not solve all of the agency problems that exist between the absent class members and the class attorney. As numerous authorities have pointed out, the prevailing fee arrangements for class attorneys have perverse effects, usually awarding lawyers far more per hour for settling the case inexpensively rather than pursuing the matter to litigation to obtain a higher reward. Various proposals to eliminate those problems include incentives, such as an increasing share of recovery for the attorney with the higher the recovery for the class,<sup>330</sup> and disincentives, such as limiting the share of recovery for any lawyer or firm to no more than the share of the recovery that the lawyer or firm would receive from seeing the case through to judgment.<sup>331</sup> Still another proposal suggests having the class members with the largest individual claims take on a special role of monitoring the class lawyer.<sup>332</sup> None of these proposals is incompatible with the consent-based approach to settlement suggested here. Their proponents contend that they will increase the size of the settlement offers that are transmitted to the class, though critics of the proposals argue that the incentives will eliminate the chances of settlement altogether.<sup>333</sup>

### VIII. CONCLUSION

A consent-based approach to the settlement of class actions is the only way to

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even in cases in which the opt-out choice currently operates as a means of securing consent (or refusal) to class action settlement.

<sup>330</sup> See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 697 (1986). The subject of regulation of attorneys' fees in mass torts cases is canvassed in Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425 (1998).

<sup>331</sup> See Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for Too Little*, 48 HASTINGS L.J. 479, 482-85 (1997) [hereinafter *Asymmetric Rewards*]; see also Bruce L. Hay, *The Theory of Fee Regulation in Class Action Settlements*, 46 AM. U. L. REV. 1429, 1450-75 (1997) (justifying fee regulation and proposing novel approach).

<sup>332</sup> The proposal applies to securities class actions and discusses the special role that the larger institutional investors can play in supervising the attorney for the class. See Weiss & Beckerman, *supra* note 245, at 2110-12.

<sup>333</sup> In particular, the Hay proposal would all but eliminate classes composed of individuals who might file suit in the future. I would advocate such a step only in those instances in which the individuals could not be identified and notified adequately. The proposal eliminates those classes by disallowing any fee to the lawyer that is greater than that the lawyer would receive if the case went to judgment. As he notes, there is little likelihood that more than a handful of the people who have not yet contemplated suit would choose that particular lawyer and pay his or her fee if they eventually filed suit and litigated their cases to judgment, so the maximum fee for litigating the class action to settlement would be minuscule. See Hay, *Asymmetric Rewards*, *supra* note 331, at 498.

respond to the fact that classes are composed of individual litigants, with their own interests and their own appetites for recovery and for risk. The *Amchem* approach to the settlement of class actions, by drawing the inquiry into abstract issues of common question predominance and representative adequacy, threatens the usefulness of class action procedure and the benefits of class action settlement in many cases.

Offering each class member the option to accept or reject a settlement will permit courts to continue to pursue valuable settlements while applying predominance and representative adequacy tests flexibly. At the same time, it will provide class members what they currently lack: individual choice, the most important component of any contract to settle a legal claim in the course of ordinary litigation.

